

REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF LOUISIANA.

EASTERN DISTRICT.
NEW-ORLEANS, MARCH, 1840.

LANDRY VS. MARTIN ET AL.

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March, 1840.

APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT, FOR THE
PARISH OF ASCENSION, THE JUDGE OF THE DISTRICT PRESIDING.

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The plaintiff claims a back concession of forty arpents, under a Spanish grant made in 1796, which runs into the defendant's tract fronting on Bayou Lafourche, and which was set off by the king's surveyor in metes and bounds to certain settlers or colonists, without any regular grant in 1779: *Held*, that this title is superior and will hold the land against the Spanish grant of subsequent date.

The Spanish government recognizes verbal as well as written grants to land; and a verbal grant, set off by the king's surveyor, passes all the right of the king to the domain, which cannot be subsequently granted by any of his governors.

After long and continued possession of land, for nearly half a century, if a written grant were necessary, the testimony of witnesses, after the loss of the archives and titles, will authorize the court to presume it.

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The plaintiff alleges he is owner of a tract of land, nearly six arpents, fronting on the Mississippi, with a back concession or double depth of eighty arpents, running back near the Bayou Lafourche, and that the titles to said tract were confirmed by the board of commissioners: That he and those under whom he claims have been in possession under Spanish grants; the first in 1775, and the second, to the back concession, dated in March, 1796. He further alleges, that the defendant has taken possession, and claims to hold about two hundred and forty acres of his rear tract, and claims to hold it under a superior title, and is committing waste thereon, to his damage six thousand dollars. He prays that his title to the land in question be declared valid, and that he have judgment for his damages, and be quieted in his possession.

The defendant, Martin, pleaded a general denial; and averred, that the tract of land, part of which is claimed by the plaintiff, was set apart and separated from the domain by the competent Spanish authorities, upwards of fifty years ago; and was one of the first settlements made by the colonists of the district, or post of Valenzuela, on the Bayou Lafourche, and fronting on the same, having the ordinary depth of all grants made by the Spanish government, of forty arpents; and that the same has constantly been in the quiet and peaceable possession of him and those under whom he claims, and in cultivation, and to the knowledge of the plaintiff, for at least fifteen years. He further avers, that he verily believes that the original grants or titles, or the evidence of said settlements of the colonists of the post of Valenzuela, were lost or destroyed by fire, in the conflagration of New-Orleans, in 1788.

The defendant further avers, that he has made valuable improvements on said land, worth ten thousand dollars, for which he demands payment in case of eviction: he also calls the heirs of Acosta, from whom he purchased, in warranty, and prays judgment against them, if the plaintiff succeeds. They appeared and made defence.

The defendant also pleaded prescription of possession, under a good title, to the knowledge of the plaintiff, for more than ten years.

Upon these pleadings and issues, the cause was tried.

The evidence showed, that the plaintiff's front tract was granted to one J. B. Peychaux, by the Spanish government, in 1775, with the depth of forty arpents; and that in 1796, a back concession, extending forty arpents further, was granted. This entire tract running back from the Mississippi, also runs parallel with the Bayou Lafourche, at that place, and within a few acres of it. In 1779, there was a Spanish colony settled on the Lafourche, at a little post called Valenzuela by the Spanish government, and the colonists were allotted tracts of land by the Spanish surveyor, designated by metes and bounds, and the owners put in possession, but no written titles or grants were shown. These tracts, in running back forty arpents from the Bayou, extended in the rear of the plaintiff's original tract. When the back concession was granted, seventeen years after the defendant's ancestors, or original authors or owners settled the land in question, it interfered with them to the extent complained of. The question is, shall the plaintiff hold the disputed premises, in virtue of his subsequent grant, or shall the defendant keep his land, in virtue of the original settlement right, without any express written grant?

The cause was submitted to a jury, on the evidence and arguments of counsel, who returned a verdict for the defendant; and, from judgment rendered thereon, the plaintiff appealed.

Winchester and Ives, for the plaintiff:

1st. This being a petitory action, the plaintiffs acknowledge the principle, that they must recover by the strength of their own titles, and not by the weakness of their adversary.

2d. The plaintiff claims, by virtue of a complete grant made by Governor, the Baronde Carondelet to J. B. Peychaux, on the 10th day of March, 1796, (and a confirmation of the same made by the United States commissioners in 1806,) from whom he holds, by a regular chain of conveyances and peaceable possession, and uninterrupted up to the time of the trespass complained of in the petition.

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3d. The defendants have only a confirmation from the United States, commonly called a settlement right, granted them under the act of March 3, 1807. See *Land Laws*, 548, section 2. Such claims, being derived exclusively from the United States, as a donation, cannot prevail over a complete grant from the former government, secured by the treaty.

4th. Complete grants will prevail over confirmed inchoate titles; 5 *Martin*, 653, 6 *Martin*, 679; and even over an order of survey of anterior date, 1 *Martin*, N. S., 430, for the reason, that the government of Spain contemplated, and did, by its legislation, retain sovereignty over the soil, till the issuing of a complete grant or patent. See ordinances of Morales, *Land Laws*, 984, article 18; and by the 21st and 22d articles of same ordinance, even those, who possessed by permission, or under orders of survey (executed,) were ordered to call, within the peremptory term of six months from the date of the ordinance (17th July, 1799,) for their titles, (patents,) under, forfeiture of all previous rights.

The same doctrine, that Spain retained the sovereignty over the soil till the issuing of the patent, is recognized in 5 *Martin*, N. S., 35, *Gonsolin vs. Bradshaw*, and in 8 *Martin*, N. S., 653, *Boatner vs. Ventress*.

5th. If the confirmation obtained by the defendant in 1807, avails him for any thing, it is because his primitive title or claim was inchoate, and wanted the action of the government to complete it. On the other hand, the title of the plaintiff is complete since 1799, and is secured by the third article of the treaty of session. *Land Laws*, 43, articles 2 and 3.

6th. Private property being secured by the treaty of session, and the vacant lands only ceded, the legislation of congress can only extend over the vacant lands: then the commissioner's confirmation of the defendant's land, fronting on the bayou forty arpents deep, can only avail the defendant as evidencing title, so far as the vacant land extended back from the bayou, for such confirmations only go to the extent of a quit claim, a renunciation of title by the government of the United States, as far as it has any.

7th. The defendant cannot avail himself of prescription, because he has never been in possession: that is, he has never cultivated, nor enclosed by fences, any part of the land in confiction, although he claims title to it in his pleadings.

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8th. There can be no prescription when the possession is equivocal, as where two possess simultaneously. In the doubt, we must always decide in favor of the title. 1 *Troplong*, 564, article 359, No. 3.

9th. Actual possession, with a title relative to that possession, supposes possession since the date of the title, and to the extent of the title; for the title explains the possession, gives it its character, and by it we judge of its quality. *Louisiana Code*, 3454; 1 *Troplong*, 634, article 425, and 457 article 276.

10th. If one possess property, and afterwards add to it the adjacent land, by purchase, the possession of one of the parts, is possession of the whole. 1 *Troplong*, 457, articles 276 and 277.

Isley and Nicholls, for the defendant and warrantors.

1st. The tract, of which the land in controversy in this suit forms a part, were at that time severally surveyed by Laveau Trudeau, from the balance of the public domain, and separated by metes and bounds, and delivered, in their full extent, into the real and actual possession of Domingues and Perera, defendants, original authors. *Record*, 5, 6, 7, 8. The settlement upon, and possession by these colonists, Domingues and Perera, were afterwards recognized by Morales, in 1782. This is a perfect title, as has in more than one instance been decided by this court. See *Sanchez and Wife vs. Gonzales*, 11 *Martin*, 207; *Le Blanc et al. vs. Victor et al.*, 3 *Louisiana Reports*, 47. The Spanish government recognized verbal as well as written grants. *Idem*, 450 and 436, and authorities; *Strother vs. Lucas*, 12 *Peters' Reports*, 437; and the acts of Laveau Trudeau, the king's surveyor, within the sphere of his duty, are, *prima facie*, taken to be within his power. 12 *Peters' Reports*, 452; 8 *idem*, 453; 5 *idem*, 469, 134, 734-5; 9 *idem*, 727; 6 *idem*, and cases cited 10 *idem*, 33.

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2d. After so long a lapse of time, the legal presumption of the validity of defendants titles would attach, by the maxim that, in favor of long possession and appropriation, every thing which has been done shall be presumed to have been rightfully done. The law will presume, that whatever was necessary has been done. 12 *Peters' Reports* 452, and cases cited; and would raise the legal presumption of a grant, by the most solemn instrument, although the evidence cannot now be produced. *Phillips' Evidence*, New-York edition of 1820, 124; *Mayor of Hull vs. Homer, Cowper*, 102; *Lessee of Alston vs. Sanders*, 1 *Bay's Reports*, 26. Besides, the evidence clearly establishes defendant's title as far as parole proof can.

3d. The jury whose province it was to judge of the credibility of the witnesses, and the weight of their testimony, have, by their verdict, supported defendant's title. 12 *Peters' Reports*, 451. Courts of justice cannot expect, and ought not to require, after such a great interval of time, the same exactness of proof as in recent transactions; and plaintiff has no right to complain, if presumptions are indulged against him, when he has neglected enforcing his claim for the period of forty years. *Walker vs. Fort*, 3 *Louisiana Reports*, 538; *Baker vs. Toules*, 11 *Louisiana Reports*; *Troplong's Prescription*, page 12.

4th. The plaintiff appears to lay great stress upon the fact, that the title to defendant's land was confirmed as a settlement right, under the act of March 3, 1807, and that being only a donation from the United States, it cannot prevail over a complete grant from the former government secured by the treaty. If the defendant based his claim to the land solely on the confirmation, plaintiff's title would, probably, supercede that of defendant. But such is not the fact; he claims under a perfect title from the Spanish government, which is as much protected by the treaty of cession as his own.

5th. Defendant and appellee has acquired a complete title by prescription, to the whole of the premises in controversy, independent of his grant, because, if the putting in possession of defendant's authors is not evidence of a grant, it certainly

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does prove a *pedis possessio*, the continuance of which, for four years, vested in the possessors a perfect and indefeasible title under the Spanish laws.

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Martin, J., delivered the opinion of the court.

The plaintiff alleges, that he is owner of a tract of land on the Mississippi, with a double concession, or eighty arpents in depth, under a complete Spanish patent, and his title has been confirmed by the land commissioners of the United States; and although he, and those under whom he claims, have been in possession for a very long time, the defendants have entered upon, and claimed the lower part of the double concession, on which they have committed great waste.

The defendant pleaded the general issue, that the part of the land which the plaintiff claims from him, was set apart and separated from the king's domain, by the Spanish authorities, half a century ago; and was one of the first settlements made by the colonists, of the post or district of Valenzuela, on Bayou Lafourche, fronting on the same, and having the ordinary depth of forty arpents, and has been constantly in the peaceable, quiet, just and undisturbed possession of the defendant, or those under whom he holds, cultivating the same ever since; within the knowledge of the plaintiff, for upwards of fifteen years. He claimed the value of his improvements, and called his vendor in warranty. By an amended answer, the defendant avers that he held the lands by a regular chain of titles from the original settlers of Valenzuela, in 1779. That his claim has been confirmed by the land commissioners of the United States: He also pleads prescription. He further avers, that the title of those under whom he claims has been frequently recognized by the plaintiff, and those under whom he claims.

There was verdict and judgment for the defendant, and after an unsuccessful attempt to obtain a new trial, the plaintiff appealed.

It appears that the plaintiff has title, by several conveyances, to a tract of land, lying on the Mississippi, near Bayou Lafourche, originally granted to one Le Blanc, about the year

1775, with a depth of forty arpents. That in the year 1779, those under whom the defendants claim, being settlers, brought at the expense of the crown from the Canary Islands, had lots of ground allotted to them, by metes and bounds, and surveyed by the king's surveyor general, fronting on the Bayou Lafourche, and extending therefrom to the back of the land granted to Le Blanc. That these settlers, being placed on the ground allotted to them, were at first furnished with rations, from the royal stores, until they were able to subsist on the produce of the land which they improved and cultivated. That in the year 1796, John Peychaux, who had succeeded to Le Blanc, in the ownership of the tract of land granted to him in 1775, obtained from the Spanish government the double concession of the said tract, to wit: the prolongation of its lateral lines, to the distance of forty arpents. And it is in evidence that, the *locus in quo*, claimed by both parties to this suit, is within the second concession of the original tract granted to Le Blanc.

Both plaintiff and defendant have obtained a confirmation of their title by the United States. Joseph Comes, under whom the plaintiff claims, purchased at the sale of the succession of Peychaux, the original tract granted to Le Blanc, with the second concession which Peychaux had obtained, and in his act of sale, the premises are sold without prejudice to the settlements on the Bayou Lafourche. *Siempre que no perjudiques à los establecimientos de dentro de Lafourche.*

It is, therefore, clear, that Comes did not acquire, and consequently could not convey, any land which made part of the settlements fronting on the Bayou Lafourche, and extending behind the tract originally granted to Le Blanc, the rear of which land, was within the forty arpents, composing the second concession, obtained by Peychaux in 1796, and seventeen years after the formation of the settlement of Valenzuela in 1797. The king of Spain, having in that year parted with all his right to the lot of land on which Perera and Domingues, under whom the defendant claims, were settled, his governor could not, by a posterior grant, destroy the title vested in those settlers.

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In the title of Stephen A. Hopkins, the vendee of Comes, the imperfection of the vendor's right to the second concession, prevented an absolute conveyance of it, and nothing was sold but the pretensions of the vendor to this second concession. On these facts, we are of the opinion that, the plaintiff has failed to show a title in himself. Admitting that the defendant has shown no title under Perera and Domingues, it is clear that the land granted to these two settlers, was expressly excluded from that sold to Joseph Comes, and by strong implication in the sale from Comes to Hopkins. This renders it unnecessary to examine whether the defendant has shown title in himself, under Perera and Domingues.

It has, lastly, been urged, that the defendant has failed to show an actual grant, in writing, to any of the colonists of Valenzuela.

The Spanish government recognized verbal, as well as written grants. *Strother vs. Lucas*, 12 *Peters*, 10, 447-450; *Sanchez and Wife vs. Gonzales*, 11 *Martin* 207; *Le Blanc et al. vs. Victor et al.*; 3 *Louisiana Reports*, 47. The authority of Laveau Trudeau, the king's surveyor, is presumed, according to the decision of the Supreme Court of the United States, in the case above cited, of *Strother vs. Lucas*, 12 *Peters*, 437.

It is in evidence, that the colonists were placed on their respective lots by the officers of the king; that his surveyor general surveyed each lot, and marked its metes and bounds, the stakes whereof are, in many parts, still extant. That the archives of the province were partially destroyed in the conflagration of New-Orleans, in 1788, and whatever escaped from the flames was carried away on the transfer of the province. After such a long possession in the colonists, and those who claim under them, if a written grant were necessary, the evidence before us would authorize us to presume it. The jury have done so, and we believe they did not err.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Held, that this title is superior, and will hold the land against the Spanish grant of subsequent date.

The Spanish government recognizes verbal as well as written grants to land; and a verbal grant, set off by the king's surveyor, passes all the right of the king to the domain, which cannot be subsequently granted by any of his governors.

After long and continued possession of land for nearly half a century, if a written grant were necessary, the testimony of witnesses, after the loss of the archives and titles, will authorize the court to presume it.

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ON A REHEARING.

On a re-examination of this case, the former opinion is maintained and affirmed; that under the Spanish laws, a title to immoveable property may be shown by parole evidence.

Winchester, for the plaintiff, and appellant obtained a rehearing in this case, and urged the following points, in support thereof:

1st. That the court appears to have assumed, erroneously, that the plaintiff and appellant had not shown title in himself to all the land embraced by the patent, for the double concession.

2nd. That the court has taken for granted what is not proved, to wit: that the persons under whom the defendants claim had an anomalous grant from the Spanish government by the operations of the surveyor general laying off to them, as colonists, a specific portion of land by metes and bounds, which interfered with the title in form, afterwards granted by the same government.

3rd. That the court overlooked certain bills of exception, touching the kind of evidence, admissible to prove such irregular grant of land, by the sovereign.

Upon each of these points, the undersigned counsel begs leave to add a few remarks:

1. The patent, itself, certainly gave the original patentee a complete title to all the land; in the double concession, which had not been previously granted to others it contains no specific reservations. It does not differ, in point of form, from all other patents: and, therefore, if the question were between the original patentee, and the colonists of Valenzuela, it is clear, the latter would be obliged to show an earlier investment of title by the sovereign, to a specific portion of land embraced by the patent. But the court appears to have supposed, that at the sale of the estate of the patentee, all the land was not sold; that, in the sale to Comes, there was

a reservation different from that contained in the patent itself, amounting to a recognition of the title of the colonists. The expressions in that sale, are: "*La cual habitacion se compone de cinco arpanes de frente, &c., con la profundidad de ochente arpanes, sin que en ellos perjudique á los establecimientos de Valenzuela, o dentro de Lafourche.*"

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The whole act must be taken together, in order to ascertain the intention of the parties. The court seems to have supposed that something was reserved, that some part of the land was not conveyed, and yet in the same act Psychaux desists from all ownership to any part of the patent. Again, when the land was sold by Psychaux, it was sold by the Probate Court, as forming part of the estate of Marie Magdelaine Landry, deceased, wife of Psychaux. She left only one child, a son, called Joseph Comes, the fruit of a previous marriage, and this same Comes is the purchaser at the sale. If the contested clause contains a reservation of any part of the patented land, it was reserved to this same Comes, whose entire rights the plaintiff holds by a succession of sales, thus uniting through Comes, not only what was sold by the Probate Court, but what was reserved, if any thing was reserved.

2 If my first proposition be true, that the court erred in supposing that all the pretensions of the grantee of the double concession did not pass by the subsequent sales, the second follows as a necessary consequence, to wit: that the court ought to have required proof of the title of the defendant, such as is set forth in the answers. History, or tradition, may suffice to show that a certain colony was established on Lafourche, but history does not descend to such minute details as are required in courts of justice, as to the extent and nature of certain concessions. History does not inform us that, each colonist had an allodial grant of a certain front on the bayou, with a depth of forty arpents; much less does it show, whether such permission to settle, conveyed an inchoate, or a perfect title, or what conditions were attached to those concessions, and when such questions arise between

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the patentee and the descendants of the colonists, they cannot be safely solved by reference to tradition.

3 It is preposterous to presume upon the mere parole evidence of three or four now antiquated witnesses, all of whom, from a strict examination of their testimony, will be found to be indirectly interested, and they only from nine to fifteen or sixteen years old, when the facts about which they testify, are said to have transpired; and only one of whom could read or write, and all pauper children from the Canaries, that a grant of forty arpents, in depth, was made at a particular spot, on the bayou, to André Debega, and that surveyed and possession given him by L. Trudeau, the king's surveyor general, but no *proces verbal* of this survey is offered, nor evidence of its destruction by fire. The plaintiff excepted to the reception of any parole evidence to prove the orders or ordinances of the Spanish government, or of surveys made by L. Trudeau, as surveyor general, and insisted that the *proces verbal* of survey, or a copy duly certified, should be produced, or its loss accounted for.

Simon, J., delivered the opinion of the court.

This case is now before us on a rehearing, granted at the request of the plaintiff. We have listened attentively to the arguments of the counsel, and after a careful re-examination of the evidence found in the record, and a mature reconsideration of the opinion heretofore pronounced by this court, we have not been able to find any reason to be dissatisfied with it.

It is, therefore, ordered, adjudged and decreed, that the former judgment of this court be maintained, as if no rehearing had been granted.

WILLET vs. TESSIER.

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EAST BATON ROUGE, THE JUDGE THEREOF PRESIDING.WILLET
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A minor, not emancipated, is not bound by mercantile contracts; nor by an engagement to enter into partnership to carry on mercantile business. Minors, not emancipated, are incapable, even with the authorization of their tutors, to make valid contracts in relation to business or mercantile transactions.

No consent of the father or tutor of a minor can remove the disabilities of minority. If it could, it would amount to a verbal emancipation, which is forbidden by law.

The plaintiff alleges, that he entered into a contract or agreement with the defendant, to carry on mercantile or commission business in New-Orleans, and made preparations by renting a house, advertising, printing cards, &c., to embark in the business in pursuance of said agreement, when the defendant withdrew from it without any just cause. He alleges that the defendant is liable for said expenses and for damages, according to an account annexed.

The defendant pleaded minority, and set up other matters in defence.

The plea of minority was clearly supported by the evidence, and the defendant had judgment, from which the plaintiff appealed.

Elam, for the plaintiff.

Brunot, contra.

Morphy, J., delivered the opinion of the court.

Plaintiff states that defendant entered into a contract with him to carry on general commission business in the city of New-Orleans, as commercial partners, under the style of Willet & Tessier; that in furtherance of this object, expenses were incurred for the printing of circulars, cards, and other advertisements, purchase of furniture, store rent, &c. That

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A minor, not emancipated, is not bound by mercantile contracts, nor by an engagement to enter into partnership to carry on mercantile business.

Minors not emancipated are incapable, even with the authorization of their tutors, to make valid contracts in relation to business or mercantile transactions.

No consent of the father or tutor of a minor can remove the disabilities of minority; if it could, it would amount to a verbal emancipation, which is forbidden by law.

without any just reason or cause, defendant withdrew from his engagements to the petitioner, and refuses to pay any of the said expenses, or the damages sustained by him in consequence of defendant's illegal and unjustifiable conduct. A plea of infancy was set up in defence. The judge below being satisfied of its correctness, gave judgment in favor of defendant. The plaintiff appealed.

The evidence shows, conclusively, that defendant was a minor at the time he made this agreement with plaintiff, and is yet under age. No proof of this minor's emancipation is to be found in the record. It is clear, that under the provisions of our law, minors not emancipated are not bound by mercantile contracts; and, therefore, cannot engage in any partnership to carry on mercantile business. See *Louisiana Code*, article, 379, 1775, 1778, 1867, 2222. But the plaintiff's counsel contends, that our laws in certain cases authorize minors to make contracts with the intervention of their tutors or curators; and that the defendant's father knew of this partnership, and approved of it, if he did not authorize it. The cases alluded to are to be found in article 1778 of the Code, which applies only to emancipated minors. No consent, approbation, or even express authorization of defendant's father, could remove the disabilities under which defendant labored. If it could, it would amount to, and operate as a verbal emancipation, when our law requires such an important act to be made before a notary public, in presence of two witnesses; or rather, it would supercede and do away, entirely, with the necessity of any emancipation at all.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

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DÉSORMES' HEIRS vs. DÉSORMES' CURATOR.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF POINTE
COUPEE.

DÉSORMES'
HEIRS
vs.
DÉSORMES'
CURATOR.

Where third persons, not parties to the original suit, claim the right to appeal, and their capacity to appear, or interest in the matter before the court, is denied, the case will be remanded to try this issue.

In this case the curator of the estate of J. Baptiste Désormes, filed an account or tableau of distribution, in the Court of Probates, and demanded its homologation. Two oppositions, only, were filed, which were partly admitted, and the tableau thus amended, was confirmed by a judgment of the court.

Paulin Désormes, and the under tutor of Laurent Désormes, then came forward and prayed an appeal; alleging that they are the only legal and forced heirs of J. B. Désormes, deceased, and their rights greatly injured and prejudiced by said judgment.

L. Janin, for the curator and appellee, moved to dismiss the appeal, on the following grounds:

1. That the appeal was made returnable on Monday, September 4, 1839. The order was dated August 21, 1839.

Without any application on the part of the appellant, (as far as appears from the record) the judge made, on September 14, 1839, a new order, immediately under the former, which he did not rescind; thereby making the appeal returnable on Monday, November 4, 1839. The appellee was cited to appear on the last mentioned day. But the judge had no right to make the second order; the first alone stands, and the appellee was consequently cited to appear after the return day. According to the decision in *Laville vs. Righter*, the appeal must be dismissed. 11 *Louisiana Reports*, 199.

2. Because, even if the second order had been valid, the record which under that order ought to have been filed on the fourth Monday of November, was only filed on December 11, 1839, and no application was made to the court for leave

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March, 1840. Reports, 177.

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3. It will be seen that the record is not certified as containing all the evidence, and that the appellants rely on errors apparent on the face of the record. (See their points.) That being the case, the appeal must be dismissed, because the record was brought up on December 11, 1839, and the assignment of error was filed more than ten days afterwards, viz: on December 27, 1839. The law is imperative on this subject. *Code of Practice*, 897; 1 *Louisiana Reports*, 52; 6 *Louisiana Reports*, 144, 156, 209.

4. The appellants have not alleged in their petition of appeal, that they have a pecuniary interest in the judgment; 4 *Martin*, 622, 342. If the appellants are indeed the children of the deceased Désormes, they ought, first, to show that they have been recognized as such, and as his heirs; until then they have no right to demand an account. *Stein vs. Bowman, curator*, 9 *Louisiana Reports*, 284. And they ought, furthermore, to aver that they claim as heirs and accept the succession; that they have not done, and Laurent Désormes could not do so without the advice of a family meeting and the authorization of the Court of Probates. All these matters ought at least to have been alleged; until then, the appellants have not even made an averment of interest.

Turner and Flower, for the appellants, assigned various errors on the face of the record:

1. The judgment was rendered without citation and without proper parties; there being no party defendant.

2. There was no trial between the plaintiff and any defendant; the collateral issue did not authorize a judgment in the principal cause.

3. The account rendered by the curator, should have shown the amount of the estate in his hands, and which it has not done in a sufficient and proper manner.

4. The judgment, homologating the account, was given without proof, although it consisted of many items. If any

testimony was given, it was not taken down by the judge, EASTERN DIST.
nor were any vouchers exhibited, and this the law requires in March, 1840.
all cases heard and decided in the Probate Court.

Morphy, J., delivered the opinion of the court.

This is an appeal from an order of the Court of Probates, homologating an account rendered by the appellee as administrator of the estate of J. B. Désormes. The appellants, Paulin Désormes and Laurent Désormes, were not parties in the court below, but have taken this appeal on their suggesting that they are the sole surviving legal and forced heirs of the late J. B. Désormes, and that the judgment contained errors to their injury and prejudice. It is denied that they have shown in themselves any pecuniary interest which authorizes their intervention, or that they have qualified themselves to appeal by proving the capacity in which they appear before this court. To try the issue thus presented, would be to assume original jurisdiction in relation to it, even if we had before us the necessary evidence, which we have not. The case must, therefore, be remanded. 10 *Louisiana Reports*, 438 ; 6 *Martin, N. S.* 307.

It is, therefore, ordered, that this cause be remanded to the Court of Probates, with directions to the judge to inquire into appellant's claim to this appeal.

KIRKMAN vs. WALTON ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW ORLEANS.

Judgment affirmed with the maximum of damages as a delay case.

This is an action against the makers of two promissory notes. The defendants admitted their signatures, and pleaded a general denial.

EASTERN DIST. The plaintiff made full proof of his demand, and had
March, 1840. judgment, from which the defendants appealed.

HASSON
VS.
SPEARING.

Elwyn, for the plaintiff.

Morphy, J., delivered the opinion of the court.

Defendants are sued on two notes of hand, payable to the order of the plaintiff. They admitted their signatures, made no defence below, and yet have appealed. The appellees pray for judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from, be affirmed with costs, and ten per cent. damages, on the amount of each note.

HASSON VS. SPEARING.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

No defence being made in either court, judgment is affirmed with the maximum of damages as a delay case.

This is a suit against the acceptor of a bill of exchange. The defendant pleaded a general denial, and denied specially, that the plaintiff was the lawful holder of the bill sued on, &c.

On the trial, the plaintiff proved his demand, and had judgment, from which the defendant appealed.

Jones, for the plaintiff, prayed the affirmance of the judgment, with ten per cent. damages.

Grivot, contra.

Morphy, J., delivered the opinion of the court.

The defendant appeals from a judgment, condemning him to pay the amount of a bill of exchange accepted by him.

No defence having been attempted in either court, we cannot consider this appeal as having any other object than delay.

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March, 1840.

It is, therefore, ordered, adjudged and decreed, that the judgment below, be affirmed with costs, and ten per cent. damages on the amount sued for.

NOELLE ET AL.
VS.
SOLOMAN.

NOELLE ET AL. VS. SOLOMAN.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

Appeal taken for delay, and judgment affirmed with the maximum of damages.

This is an action against the maker of a promissory note. There was a general denial, and no defence at the trial.

The court was of opinion, the defendant, by his plea or answer, admitted the note sued on to be his, gave judgment for the plaintiff, without any other evidence. The defendant appealed.

L. C. Duncan, for the plaintiff, prayed the affirmance of the judgment, with damages.

Bullard, J., delivered the opinion of the court.

This is an action upon a promissory note, and the defendant has appealed from the judgment rendered against him as maker. The appeal was manifestly taken merely for delay.

The judgment of the City Court is, therefore, affirmed, with costs, and ten per cent. damages.

EASTERN DIST.

March, 1840.

BACON VS. HUIE.

WHITEHEAD

VS.

ALBRITON.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The plaintiff made proof of demand and notice to the endorser, and had judgment, which is affirmed with the maximum of damages.

This is an action against the endorser of a promissory note. The defendant pleaded a general denial, admitted his signature, and prayed for a jury. On the trial, the plaintiff produced the note, protest and notice thereof to the endorser, and had a verdict and judgment. The defendant obtained an appeal, but made no defence in this court.

Sterrett, for the appellant.

F. B. Conrad, contra.

Morphy, J., delivered the opinion of the court.

The defendant is sued, as endorser of a promissory note, and the proof of demand and notice, has been made out by plaintiff. We are asked to give damages as on a frivolous appeal. The appellee is, in our opinion, entitled to them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below, be affirmed, with costs, and ten per cent. damages on the amount of the note sued on.

WHITEHEAD VS. ALBRITON.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST BATON ROUGE, JUDGE JOHNSON PRESIDING.

Where a party claimed title to a piece of land, or a sum of money for work done on it, and propounded interrogatories to his adversary to establish his claim, which negatived title, but left the money demand

doubtful, and the jury give a less sum than was claimed, their verdict will not be disturbed.

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March, 1840.

The plaintiff alleges, he has been in possession of one hundred acres of land more than a year, in accordance with an agreement between him and the defendant ; that he was to pay five hundred dollars in five years, in equal annual instalments, for said land, and in the meantime have the privilege of cultivating a field of thirty-six acres, until he could open and clear twelve acres of the one hundred acre tract : That said defendant refuses to make title, or allow him to cultivate the field as agreed on, to his damage three hundred dollars ; and that he has performed work and labor, on said land, worth four hundred dollars : He propounds interrogatories to the defendant, to be answered in court on the first day of the next term, touching the title to the land in question, and prays that if the answers affirm title, that he be decreed to be owner ; but if they negative it, that he then have judgment for the sum of four hundred dollars, as the value of the work and labor he has expended on said land.

WHITEHEAD
VS.
ALBRIGHTON.

The defendant expressly negatived the question of title, but admits there was a conditional agreement that the plaintiff was to come and live on the land with his family, and that he did so, but failed to comply with the conditions of their agreement.

There was an answer denying the plaintiff's demand, and setting up a claim in reconvention : and upon the issue thus joined, testimony was taken and the cause submitted to a jury, who returned a verdict of two hundred and forty-two dollars for the plaintiff.

After an unsuccessful attempt to obtain a new trial, from judgment confirming this verdict, the defendant appealed.

Elam, for the plaintiff and appellant, insisted on the affirmance of the judgment.

Brunot, for the appellant, contended :

1st. There was error in the judgment of the court below. The answers of the defendant on facts and articles, are uncon-

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WHITEHEAD
vs.
ALBRIGHTON.

tradicted and must be taken as true. Vide *article of the Code of Practice*, 354 ; 11 *Louisiana Reports*, 356.

2nd. Taking the answers of the defendant as true to the interrogatories on facts and articles, the plaintiff got possession of the defendant's land in bad faith, and could not thus acquire a claim against him for improvements. This would enable a party to take advantage of his own wrong. Vide *article Civil Code*, 3415, 3416.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges, that he entered into a contract with the defendant for the purchase of a part of his land, for five hundred dollars, payable in five years, in equal instalments, he agreeing to pay interest at ten per cent. on the purchase, until the principal should be paid, and that he was to have the use of an undivided half of a field, containing about twenty-four acres, to cultivate until he could clear, fence and put under cultivation, twelve acres of the said land. He alleges, that he has paid forty-two dollars on account of the interest, and that he entered upon possession in pursuance of said agreement, and has made valuable improvements, but that the defendant, in violation of his agreement, had prevented him from cultivating one half of the field. He sues for a title to one hundred acres, according to agreement and propounds interrogatories to the defendant, touching the contract, and he prays that should said contract be negatived by the defendant's answers on oath, then he may have judgment for four hundred dollars, for work and labor done on the premises.

The defendant denies, on oath, the contract, as set forth in the petition. The case was submitted to a jury, who found a verdict for the plaintiff for two hundred and forty dollars, and the defendant appealed.

It is contended by the appellant, that his answers to interrogatories are to be taken as true, and they show that the plaintiff got into possession in bad faith, and cannot recover for improvements. As relates to the title to the land, it is true, the answers are conclusive ; but with respect to the

value of the labor done on the place, and to what extent the defendant has profited by it, was left to the jury. The case turned wholly upon matters of fact, and we are not satisfied that justice requires, at our hands, a reversal of the judgment.

The judgment, is, therefore, affirmed with costs.

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March, 1840.

ALLAIN
VS.
CUVELLIER
ET AL.

ALLAIN VS. CUVELLIER ET AL.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

Judgment affirmed with the maximum of damages as a delay case.

The defendants are sued as maker and endorser of a note. They plead want of amicable demand, want of title in the plaintiff, irregularity and nullity in the protest, and pray for a dismissal of the suit, discharge of the endorser, and a trial by jury.

The plaintiff offered in evidence, the note, protest and due notice to the endorser. The jury was waived, and there was judgment for the plaintiff. The defendants appealed.

Elwyn for plaintiff and appellee.

C. Janin, contra.

Bullard, J., delivered the opinion of the court.

Judgment having been rendered against the defendants, as maker and endorser of a promissory note, they have appealed under circumstances which satisfy us that their sole object was delay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed, with costs, and ten per cent. damages.

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March, 1840.

M'MASTERS VS. KENNER—(TWO CASES.)

APPEALS FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

M'MASTERS
VS.
KENNER.

Appeals both for delay and judgment, affirmed with ten per cent. damages.

This is a suit against the second endorser of a promissory note. The plaintiff proved the defendant's acknowledgment of his indebtedness, and had judgment, from which the latter appealed.

Grivot, for plaintiff, prayed the affirmance of the judgment, with ten per cent. damages and costs.

M'Carty, contra.

Morphy, J., delivered the opinion of the court.

Defendant being sued as endorser of a promissory note, suffered judgment by default to go against him this judgment was confirmed by evidence, satisfactory to the judge below. There has been, in this court, no assignment of errors. The appeal is evidently for delay, and therefore, a proper one on which to allow appellee the damages he prays for.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed, with costs and ten per cent. damages.

In the second case, the defendant is sued as the endorser of a draft, which was protested, and due notice given to the endorsers. There was no defence, and judgment went by default, from which the defendant appealed.

Grivot, for the plaintiff, asked for the confirmation of the judgment, with the maximum of damages.

Bullard, J., delivered the opinion of the court.

This is an appeal from a judgment, rendered against the endorser of a bill of exchange, upon full evidence. It was evidently taken for delay.

The judgment of the Commercial Court, is therefore, affirmed, with costs and ten per cent. damages.

BOWMAN vs. LAMBERT.

EASTERN DIST.
March, 1840.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

UNION BANK
vs.
MACDONALD.

Delay case, and judgment affirmed, with the maximum of damages.

This is a suit against the maker of a note, who made no defence. The plaintiff proved the signature, and had judgment. The defendant appealed.

Johnson, for appellee.

Divignaud, contra.

Bullard, J., delivered the opinion of the court.

The defendant having appealed from a judgment against him, on his promissory note, rendered upon sufficient evidence, prosecutes the appeal evidently for delay.

The judgment is, therefore, affirmed, with costs, and ten per cent. damages.

UNION BANK vs. MACDONALD.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF ST. TAMMANY, THE JUDGE THEREOF PRESIDING.

The banks retain the capacity to sue and stand in judgment, notwithstanding the suspension of specie payments by them, for a longer period than that allowed by their charters.

A plea, in reconvention, claiming damages for alleged injury done to the credit, &c., of the defendant by suing him on his own notes, will be rejected, as there is no connection between the two demands.

This is an action against the maker of several promissory notes. He admitted his signature; and denied that the Union Bank could sue or stand in judgment, as it had for-

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UNION BANK

MACDONALD.

feited its charter by a suspension of specie payments. The defendant annexed several interrogatories propounded to the bank, touching the suspension and forfeiture; calling on it to state the facts, and time of suspension, &c. The plaintiff's counsel excepted to answering these interrogatories, on the ground that a corporation was not bound to answer, and could not answer by the president and directors, who are mere agents. The exceptions were sustained by the court.

The defendant asked leave to file a supplemental answer, containing a demand in reconvention for damages, for injury done his credit and reputation in the suit. The leave was refused, and a bill of exceptions taken to the decision of the court.

The cause was submitted to a jury, who returned a verdict for the plaintiff; and from judgment rendered thereon the defendant appealed.

Penn., for the plaintiff and appellee, prayed the affirmance of the judgment, with the maximum of damages and costs.

Martin, J., delivered the opinion of the court.

The defendant, sued as maker of several promissory notes, did not deny his signature to either of them, but pleaded exceptions to the plaintiffs' right to sue, having forfeited their charter by suspending specie payments. He also propounded interrogatories to the plaintiffs to establish this fact, which were excepted to by their counsel, and the exceptions sustained by the court. The defendant has no claim on this court for relief on the merits.

The decision of this court in the case of the *Atchafalaya Bank vs. Dawson*, 13 *Louisiana Reports*, 497, renders it unnecessary to examine whether the exceptions were correctly sustained or not: And whether the judge correctly refused to admit evidence of the bank having suspended the payment of its notes in specie.

Our attention has been drawn to the refusal of the court to permit the defendant to file a supplemental answer, or plea in reconvention, seeking damages for injury done to his cha-

The banks retain the capacity to sue and stand in judgment, notwithstanding the suspension of specie payments by them for a longer period than that allowed by their charters.

A plea in reconvention, claiming damages for alleged injury done to the credit, &c., of the defendant, by suing him on his own notes, will be rejected, as there is no connection between the two demands.

racter and credit. As there was no connection between this matter and that which was the object of the suit, the leave was, in our opinion, correctly denied him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

EASTERN DIST.

March, 1883.

LEWIS & SNELL-

-ES.

RODRIGUEZ

ET AL.

LEWIS & SNELLING vs. RODRIGUEZ ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Judgment affirmed with maximum of damages, as a delay case.

This is a suit against the makers and endorser of a note. There was a general denial pleaded, and no defence made. The plaintiffs made their proof and had judgment *in solido* against the defendants. The endorser alone, has appealed.

Rawle, for appellant.

Maybin, contra, prayed for affirmance of judgment and damages.

Morphy, J., delivered the opinion of the court.

Defendants appeal from a judgment decreeing them *in solido* to pay the amount of a promissory note, drawn by the one and endorsed by the other. No serious defence having been made in either court, delay is evidently their sole object.

It is, therefore, ordered, that the judgment below be affirmed, with costs, and ten per cent. damages.

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March, 1840.

VERDUN'S HEIRS vs. VERDUN'S EXECUTOR AND LEGATEES.

VERDUN'S HEIRS
vs.
VERDUN'S
EXECUTOR
AND LEGATEES.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE
PARISH OF TERREBONNE, THE JUDGE THEREOF PRESIDING.

Where a nuncupative will, by public act, states only that the "testator declared, in the presence of the witnesses, that the instrument contained his last will and testament, being dictated to the notary, in the presence of the witnesses," it is *insufficient and null* for informality; there being no mention of its having been *dictated by the testator to*, and written by the notary *as dictated*.

There must be five witnesses to a nuncupative will under private signature, unless it is made in the country, and a greater number than *three witnesses* cannot be obtained, which must be made to appear.

This is an action by the collateral heirs of Alexander Verdun, deceased, to annul his last will and testament, and to recover his estate as heirs at law, from his legatees. The plaintiffs allege the nullity of this will on the following grounds:

1st. Because it does not appear that the witnesses reside in the place where the will was made.

2d. It does not appear that the will was dictated by the testator.

3d. It is not stated that the will was written by the notary as dictated, or written by him at all.

4th. Because it is not mentioned that the testator declared that he did not know how to sign his name, when he made his ordinary mark.

5th. It is not stated that the testator made his ordinary mark in the presence of the witnesses.

6th. No express mention is made of the accomplishment of the requisite forms, or that all those forms have been fulfilled.

7th. It is not mentioned that all the formalities were fulfilled at one time, and without interruption and turning aside to other acts.

The will was drawn up by the parish judge, in the form of a nuncupative will, by public act, in the presence of and signed by three witnesses. In the body of the act, it is merely

stated that the testator declared, in the presence of the witnesses, that the act contained his last will and testament ; being dictated to the notary in the presence of the witnesses in a loud and intelligible voice.

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VERDUN'S HEIRS
OR
VERDUN'S
EXECUTOR
AND LEGATEES.

The defendants denied that the plaintiffs were heirs of Alexander Verdun, deceased, and averred, that the will was made in due form of law, and valid ; but if it is not valid as a nuncupative testament by public act, it is good as a nuncupative will under private signature : that the legatees were capable of receiving from the testator, by donation, *mortis causa*, and have a right in law to hold the property, and are not subject to any reduction. Upon these pleadings and issues the cause was tried.

A witness was sworn and examined, to show that the will was made in the country, and that more than three witnesses could not be had. In this, the defendants failed, for it appeared there was no attempt to obtain more than three witnesses. In fact the will was written by the parish judge, and intended to be a nuncupative will by public act, with three witnesses.

The legatees were illegitimate colored children of the testator, together with their mother.

The plaintiffs established their heirship to the deceased, and had judgment annulling the will, and putting them in possession of the estate. The defendants appealed.

Splane, for the plaintiffs, insisted on the affirmance of the judgment.

Miles Taylor, for the appellants, relied upon the will being good as a nuncupative testament, under private signature : that proof of the descent of the defendants and legatees, they being free illegitimate colored children, from a white father, is prohibited by law, and ought not to have been admitted. They are not prohibited by law from receiving donations *inter vivos* or *mortis causa*, and the testator had a right to bequeath them his whole estate.

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March, 1840.

VERDUN'S HEIRS

VS.

VERDUN'S
EXECUTOR
AND LEGATEES.

Simon, J., delivered the opinion of the court.

This is an action instituted by the legal heirs of one Alexander Verdun, for the purpose of annulling a certain instrument, purporting to be his last will and testament, made in the form of a nuncupative testament, by public act. Several grounds are alleged in the petition, for which the plaintiffs contend that the testament ought to be declared null and void, and among others, that it does not appear that the testament was dictated by the testator, that it was written by the notary; and that no mention is made, that it was written by the notary as it was dictated by the testator. The parts

Where a nuncupative will, by public act, states only that the "testator declared, in the presence of the witnesses, that the instrument contained his last will and testament, being dictated by the notary in presence of the witnesses," it is insufficient and null, for informality, there being no mention of its having been dictated by the testator to, and written by the notary as dictated.

of the will relative to the legal formalities, are as follows: "*Pardevant, &c., est comparu, &c. Lequel etant sain de corps et d'esprit ainsi qu'il nous a paru mais bien persuadé de la fragilité des choses humaines et de la vie, et voulant en outre mettre ordre à ses affaires en cas que son créateur le rappelle à lui déclare en présence des sieurs Joseph Delaporte et Auguste H. Verret et Henry C. Thibodeaux témoins domiciliés et requis à cette effet, son testament et act de dernière volonté, ainsi qu'il suit; savoir.*" And, at the close: "*Ce testament en à été dicté à moi dit juge en présence des témoins ci-dessus nommés soussignés et l'ayant lu au testateur à haute et intelligible voix en présence des dites témoins il à déclaré parfaitement comprendre et y persévérer. En foi de quoi le dit comparant a signé, &c.*"

It is perfectly clear, that the will attacked in this suit is not clothed with the legal formalities necessary to make it valid; it contains no mention of its having been dictated by the testator to and written by the notary, and written by the notary as dictated by the testator. We are, therefore, of opinion, that the district judge did not err in invalidating said will, as it suffices that if a testament be defective in one of the legal requisites to be invalidated, it becomes unnecessary to examine the other grounds of nullity.

There must be five witnesses to a nuncupative will under private signature, unless it is made in the country, and a greater

But it is contended, that if this testament be null as a nuncupative will by public act, it is good as one under private signature. It is true, that this last kind of testaments are not subject to the same strictness of formality as those by public act; and that it does not matter whether the testator

intended to make his will in a particular form, if it be good in one of the forms prescribed by law. *Louisiana Code, article 1574, 1575 and 1583.* But in order to make a valid testament under private signature, it is necessary that it should be received by five witnesses; unless, the testament being made in the country, a greater number than three witnesses cannot be procured. *Louisiana Code, article 1576.* In this case, it does not appear that more than three witnesses could not be had, and it is not even shown that any attempt was made to get more witnesses than the number required for a nuncupative will by public act. 1 *Martin, N. S.* 488.

We think that the testament of A. Verdun, is also void as a nuncupative will under private signature, and that the district judge did not err in giving judgment in favor of the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

HUBBELL vs. SCATES.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Judgment affirmed, as for a frivolous appeal, with the maximum of damages.

The defendant is sued as endorser of a note. He denied that the plaintiff was owner, and had right to sue on the note; and also, averred, that part of it was paid. The plaintiff had judgment on the production of the note and protest in evidence; there being no testimony for the defence. The defendant appealed.

Jones, for plaintiff, prayed for affirmance of judgment and full damages.

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HUBBELL
vs.
SCATES.

number than
three witnesses
cannot be ob-
tained, which
must be made to
appear.

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March, 1840.

NORTHERN BANK
OF KENTUCKYVS.
EDWARDS ET AL.*M. Millen*, for appellant.*Morphy, J.*, delivered the opinion of the court.

This is a suit on a promissory note, endorsed by defendant. Nothing has been shown, to induce us to refuse the affirmance of the judgment below, and the damages prayed for by appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from, be affirmed, with costs, and ten per cent. damages.

NORTHERN BANK OF KENTUCKY VS. EDWARDS ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Judgment affirmed, with maximum of damages, as a delay case.

This is a suit against the maker and endorsers of a note. There was judgment by default, made final against the defendants, on the production of the note and protest, and they appealed.

T. Slidell, for appellees, prayed affirmance of judgment, with damages.

Clarke, contra.

Bullard, J., delivered the opinion of the court.

The appellants present no ground upon which they could have hoped for relief, from this court.

The judgment of the court below, is affirmed, with costs, and five per cent. damages.

OF THE STATE OF LOUISIANA.

33

GORDON ET AL. vs. DICK ET AL.

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March, 1840.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

GORDON ET AL.
vs.
DICK ET AL.

The courts of general jurisdiction are the proper tribunals to take cognizance of partitions of partnership property, either in kind or by licitation, even if some of the members of firms composing the partnership, are dead, and their estates in the hands of executors or administrators.

The Parish Court of New-Orleans has concurrent jurisdiction with the First District Court, in all cases within the limits of said Parish, and which extends to actions for partition of property held in common, even if any or all the parties defendants be minors or persons residing *without the limits* of the State.

The jurisdiction of the Probate Court, as defined in the Code of Practice, *Article 924, No. 14*, is confined exclusively to partitions of successions, which are the peculiar objects of that court.

This is an action of partition, instituted in the Parish Court of New-Orleans, by M. Gordon, Senior and Junior, and the firm of Lizardi & Co., against N. & J. Dick & Co., and several other commercial firms and individuals, for the partition and liquidation of a commercial firm existing between the plaintiffs and defendants, styled the "New-Orleans Tobacco Warehouse Company."

The defendants, James Dick & W. J. M'Lean, representing the firm of N. & J. Dick & Co., excepted to the jurisdiction of the Parish Court, averring that W. J. M'Lean is the executor of R. L. Booker, and James Dick executor of his late brother, N. Dick, both of them deceased partners; have been qualified as such in the Court of Probates, for the parish and city of New-Orleans, and that supposing they are partners with the plaintiffs, (which is denied) they expressly aver, that the Parish Court has no jurisdiction of this case. This exception was sustained by the court, and the plaintiffs appealed.

Hoa, for the plaintiffs, contended that this was not a demand for money, but an action by some of the partners against their co-partners for a partition and settlement of the partnership

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GORDON ET AL.
VS.
DICK ET AL.

affairs; and consequently, the article 924, No. 14, of the Code of Practice, cannot be invoked. The Parish Court of New-Orleans has jurisdiction *ratione materiae*. 3 *Martin, N. S.* 674, 7 *Idem.*, 375, *Donaldson et al. vs. Dorsey's Syndic.*

2. There can be no doubt but the District Court of the first judicial district, has jurisdiction, for it is expressly given by the act of 1825, page 122; and by that of 1828, page 156, section 13, of the session acts. The Parish Court of New-Orleans has concurrent jurisdiction with the District Court in all cases arising within the limits of the parish of New-Orleans.

3. It is insisted, that even if the first District Court has jurisdiction in this case, the Parish Court has not; that the act of 1825, which gives jurisdiction to the District Court in cases of partition, like this, is subsequent to the adoption of the Code of Practice, the 127th article of which, gives concurrent jurisdiction to both courts, and does not confer the same jurisdiction on the Parish Court? In the first place, the Code of Practice was not promulgated, and was not in force when the law of 1825 passed; and secondly, the two provisions can stand together, because the general and pre-existing provisions, giving concurrent jurisdiction to both courts being in force, the act of 1825, giving expressly to the District Court jurisdiction in cases of *partition of property held in common, &c.*, did not exclude the Parish Court of its concurrent jurisdiction in like cases.

L. Peirce, contra: Insisted that the estates of N. Dick and R. L. Booker, could only be sold and partitioned by order of the Court of Probates, because it alone had jurisdiction to order inventories and sales of the property of successions. *Code of Practice, article 924.*

2. Although the petition, in this case, does not ask for an inventory and sale, yet it is an action of partition; and after the sale, or division in kind, which amounts to a sale, a settlement of accounts must be ordered before a notary, &c.

3. The Probate Court has exclusive jurisdiction to decide on all claims for money, which are brought against suc-

cessions administered by executors, &c. *Code of Practice*, 924, **No. 13.** EASTERN DIST.
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4. The act of 1825, section 3, gives jurisdiction to the District Court in cases of partitions of property, although any or all of the parties be minors, or residing out of the state. But this law does not cover the present case. This suit is not brought against heirs, but against the surviving partners who are executors of deceased ones. Their estates are in the Probate Court in a course of administration and liquidation. The act of 1825, seems to consider an estate liquidated and in possession by the acknowledged heir, major or minor, or absentee.

GORDON ET AL.
VS.
DICK ET AL.

5. But if the District Court has jurisdiction, the Parish Court has not; because the act of 1825, giving special jurisdiction in actions of partitions, such as this, is subsequent to the adoption of the Code of Practice, which gives concurrent jurisdiction to the two courts. The act of 1825, only applies to the District Court.

Martin, J., delivered the opinion of the court.

The object of this suit is the liquidation and partition of the property of a partnership which has heretofore existed between the parties. Some of the defendants denied the jurisdiction of the Parish Court; their plea was sustained, and the plaintiffs appealed.

The plea was grounded on the allegation of two of the surviving partners of the firm of N. & J. Dick & Co., that two of their late partners are dead, and their estates administered in the Court of Probates, by the two surviving partners as testamentary executors.

The partnership, the property of which is sought to be partitioned, was composed of several individuals and firms. The firm of N. & J. Dick & Co., was one of the latter. The partition is asked in kind or by licitation.

The Court of Probates, has, indeed, exclusive jurisdiction of the partition of successions. *Code of Practice*, article 924, **No. 14**; and to decide on all claims for money which are brought against successions. *Idem.*, **No. 13.** This article

The courts of general jurisdiction are the proper tribunals to take cognizance of partitions of partnership property, either in kind or by licitation, even if some of the members of firms composing the partnership are dead, and their estates in the hands of executors or administrators.

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The Parish Court of New-Orleans has concurrent jurisdiction with the first District Court, in all cases within the limits of said parish, and which extends to actions for partition of property held in common, even if any or all the parties, defendants, be minors, or persons residing without the limits of the state.

The Parish Court of New-Orleans has concurrent jurisdiction with the first District Court, in all cases within the limits of said parish, and which extends to actions for partition of property held in common, even if any or all the parties, defendants, be minors, or persons residing without the limits of the state.

of the Code of Practice does not exclude the jurisdiction of the Parish Court in the present case; for the partition of no succession is claimed, nor is there any money demanded.

But it is contended, that this suit ought to have been brought in the District Court.

According to the act of the legislature, approved March 15, 1813, (1 *Moreau's Digest* 338, section 1,) the Parish Court of New-Orleans has concurrent jurisdiction with the court of the first judicial district, within the limits of said parish.

The act approved February 16, 1825, section 3, gives jurisdiction to the District Court of the first judicial district, in "all suits for the partition of property held in common, notwithstanding any or all of the parties to be made defendants be minors or persons residing without the limits of the State." This act being posterior to the adoption of the Code of Practice, which took place April 12, 1824, modified the article 924, No. 14, of that code just cited, notwithstanding it was promulgated afterwards.

The Parish Court of New-Orleans having been established as a court of concurrent jurisdiction with the District Court for the first judicial district, is not, in our opinion, confined in its jurisdiction to cases cognizable in the District Court, in 1813. The object of the legislature in the creation of the Parish Court of New-Orleans, being to give to the inhabitants of the city and parish the benefit of two courts of concurrent and general jurisdiction, in one of which the inhabitants, whose vernacular tongue is the French language, might find the judge selected to preside therein versed in that language, and in which members of the bar might with more facility, carry on the oral proceedings. Admitting, however, that the Parish Court is restricted to the jurisdiction of the District Court, as it existed in 1813, none of the parties being minors or residing out of the state, it has jurisdiction in the present case without the aid of the act of 1825: the object of this act being to extend the jurisdiction of the District Court to cases in which minors or absentees were to be made defendants.

The article 924, No. 14, of the Code of Practice, above cited,

must, in the latter as well as the first part of it, be confined to partitions of successions; because successions are the peculiar objects of the Court of Probates, which are courts of special and limited jurisdiction, and which cannot be extended by implication to the exclusion of courts of general jurisdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; the exception overruled, and the case remanded for further proceedings according to law: the appellees paying the costs of the appeal.

HUBBELL vs. LOCK ET AL.

APPEAL FROM THE COMMERCIAL COURT.

Judgment affirmed, with five per cent damages, as a delay case.

This is an action against the maker and endorser of a note. The plaintiff alleges demand, protest and due notice to the endorser. There was a general denial, but no appearance or defence by the defendants. The plaintiff made proof of his demand and had judgment. The defendants appealed.

Jones, for the plaintiff.

Bullard, J., delivered the opinion of the court.

This is an action against the maker and endorser of a promissory note, and judgment for plaintiff upon sufficient proof. The appeal was evidently taken for delay.

It is, therefore, ordered, that the judgment below, be affirmed, with costs, and five per cent. damages.

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The jurisdiction of the Probate Court, as defined in the Code of Practice, article 924, No. 14, is confined exclusively to partitions of successions, which are the peculiar objects of that court.

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PARISH OF EAST BATON ROUGE, THE JUDGE OF THE DISTRICT PRESIDING.

The article 782, of the Code of Practice, authorizes clerks to appoint deputies, who are to take *an oath before the court in which they act*; but, when the clerk of the District Court is *ex officio* clerk of the Parish Court, his deputy may *swear in*, in either court, and the law is satisfied.

The deputy clerk is an officer known to the law, and the court will take notice of his acts, when signing himself as "deputy clerk," without using the name of his principal.

A protest signed by the notary in *the presence of two witnesses*, is sufficient, and is properly admitted in evidence.

Notices of protest, deposited in the principal post-office, where the defendant receives his letters and papers; although there is another in the same parish nearer to him, is sufficient.

This is an action against the endorser of a promissory note. There were exceptions taken to the authority of the deputy clerk to sign the citation and other process, on the ground that he had never been duly qualified and sworn, and that he did not use the name of his principal, but simply signed his name, as deputy clerk. The facts are, that he was sworn as a deputy in the Parish Court, but not in the District Court. The principal clerk was clerk of both courts.

The protest was objected to, principally, because it did not appear to be signed by the witnesses, but only done and protested in the presence of two witnesses, naming them. The original protest was annexed to the petition and offered in evidence, and excluded. The notice of protest was deposited in the post-office in the town of Baton Rouge, directed to the defendant in the parish, when it appeared there was another post-office nearer to his residence in the same parish; but it was shown the defendant received his letters and papers in the town of Baton Rouge, and had directed the post-master there, to detain and deliver all his letters and papers at that place.

The protest was excluded by the court, on the ground that it did not purport to be a copy of any authentic act, or an act of protest. The notary's certificate was admitted as evidence, but the district judge was of opinion that the plaintiffs had failed to make out their case.

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There was judgment of non-suit, and the plaintiffs appealed.

Brunot, for the plaintiffs.

1. Where the party sought to be charged by notice, has directed his letters and papers to be detained at a particular post-office, where he calls to get them, although there may be a post-office nearer his residence, the first is the one in which notice may be deposited, and will be sufficient to charge him as endorser. See *Bank of the United States vs. Carneal*, 2 *Peters' Reports*, 543; *Bank of Columbia vs. Lawrence*, 1 *Peters' Reports*, 578, 583; 16 *Johnson*, 218; *Bailey on Bills*, page 179, and note.

2. The court *a qua* erred in rejecting the protest. It is not an authentic act. The witnesses only sign the record of the notary public to test the fact of such a record. The statute makes a copy of this record evidence of the protest. The law facilitates the proof of the protest by declaring that a copy shall furnish evidence of the fact, but does not exclude other modes of proof which existed anterior to the statutes on this subject, and are not repealed by these laws. Previous to the acts of the legislature, approved February 14, 1821, March 14, 1823, March 13, 1827, found in 1 *Moreau's Digest*, 93, 94 and 96, no law authorized the copy of the protest or the notice thereof to be given in evidence; and it was to avoid the inconvenience arising from the loss of the act of protest usually attached to the note, that the legislature made a copy of a record of these protests evidence. Section second of the act of 1823, above referred to, shows clearly there may be a good protest in this state, although not made by a notary public, and that the act is really a protest and evidence without being certified by the officer making it, as being a true copy from a record of a book of protests.

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3. "The act of 1827, for the first time, declares that a certified copy of the protest, and certificate of the manner in which notices were given, the endorsers added thereto, shall be evidence of all matters therein stated." See 1 *Moreau's Digest*, 93, 94 and 96; *Gale vs. Kemp's Heirs*, 10 *Louisiana Reports*, 205; 3 *Kent's Commentaries*, 93; *Jacob's Law Dictionary*, volume 1, page 330; *Bailey on Bills*, 332 and notes 44; *Chitty on Bills*, 494, 495, 499; *Louisiana Code*, articles 18, 22, 23; 1 *Kent's Commentaries*, 464.

4. The law of 1817, only requires that the deputy of any officer belonging to any of the courts of the state, shall be sworn in either the Parish or District Court, and when so sworn and accepted, he has the power and the right to act as deputy of the officer who presented him to the court. It is the oath and the acceptance, which make the deputy an officer of the court, and he is then, to all intents and purposes, vested with full power to act in the same manner and to the same extent with his principal. 1 *Moreau's Digest*, 325.

T. G. Morgan, for the defendant, insisted, that the law required a deputy clerk to be sworn in the court in which he acted. He never was sworn in the District Court, and not having used the name of his principal in signing and attesting process of citation, &c., his acts are nullities. *Code of Practice*, article 782.

2. The act purporting to be a protest, was properly rejected. It was not made in conformity with law, and was no evidence of protest. The notice to the endorser was not served properly, even if there had been a legal protest. Judgment should be affirmed.

Martin, J., delivered the opinion of the court.

This is an action against the defendant as the endorser of a promissory note. There was judgment of non-suit, and the plaintiffs appealed.

Our attention has been first drawn to the court's overruling the exception of the defendant to the citation, on the ground that the deputy clerk who signed it, was not sworn in the

District Court; and that he did not use the name of his principal. EASTERN DIST.
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It does not appear to us that the court erred.

1. The deputy clerk had been sworn in the Parish Court; and his principal being clerk of the District Court was *ex officio* clerk of the Parish Court. The Code of Practice, article 782, authorizes clerks to appoint deputies, for whom they shall be responsible, and who are to take an oath before the court, to wit, in the court in which they act. If they act in two courts, the law is satisfied and complied with, if they swear in, in either court.

2. In relation to the second objection, the deputy clerk is an officer known to the law, received and sworn in court. The court takes notice of his acts, and he is distinguished from his principal by the words "deputy clerk."

There is a bill of exception taken by the plaintiffs to the refusal of the judge *a quo*, to admit a document in evidence purporting to be the protest of the note sued on, on the following grounds:

I. That it was not an original act.

II. That it was not authentic, it not being signed by two witnesses.

III. It does not purport to be a copy of an original or authentic act, or of an act of protest.

IV. It does not purport to be a certified copy, taken from the record books of the notary.

The document in question was the original protest, annexed to the petition, signed by the notary in the presence of two witnesses, and we think was properly admitted in evidence.

On the merits, the defendant's signature was admitted. The notice was deposited in the post-office at Baton Rouge. It is in evidence, that the defendant resides at some distance from town in the same parish; and that there was a post-office nearer to him; but the post-master at Baton Rouge, deposes, that notwithstanding this, the defendant received his letters and newspapers at the post-office in Baton Rouge, and had given directions that they should be retained and

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The deputy clerk is an officer known to the law, and the court will take notice of his acts, when signing himself as "deputy clerk," without using the name of his principal.

A protest signed by the notary, in the presence of two witnesses is sufficient, and is properly admitted in evidence.

Notices of protest, deposited in the principal post office, where the defendant receives his letters and papers, although there is another in the same parish nearer to him, is sufficient.

EASTERN DIST. transmitted to him by occasional private conveyances, and
 March, 1840. not sent through the other post-office.

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It is, therefore, ordered, adjudged and decreed, that the judgment of non-suit be annulled and reversed; and that the plaintiffs recover from the defendant the sum of five hundred dollars, with interest at the rate of five per cent. per annum from January 18, 1839, until paid; and three dollars, the cost of protest, and the costs in both courts.

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Evidence of the repeated acknowledgments of the maker of a note that he would pay it, is admissible to prove its execution, when the subscribing witness is incompetent to testify, from his relationship to one of the parties.

But where the defendant expressly alleges his signature to the note sued on, to be *forged*, evidence of his acknowledgment will not be admitted, under article 325, of the Code of Practice.

The testimony of a deceased witness, taken in writing on a former trial, is admissible in a subsequent one.

This is an action instituted by the widow and heirs of Manuel Lopez, deceased, against the defendant, a free woman of color, to annul the sale of a lot of ground, in the town of Baton Rouge, by their ancestor's debtor, Gregorio Berghel, the 25th January, 1833, on the ground that it is false, simulated and fraudulent.

The plaintiffs show, that in January, 1834, they obtained a final judgment against said G. Berghel, on an obligation given by him to the late Manuel Lopez, in his life time, on

the 22d of August, 1825, for loaned money ; said judgment amounting to five hundred and thirteen dollars, with interest and costs : That execution has issued on said judgment, and no property can be found : That the sale of the lot in question was made to avoid payment of this debt, and after it became due, and is fraudulent, null and void ; and they pray that it be annulled, and the property made liable to their claim.

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The defendant pleaded a general denial. Denied specially, that any community of property ever existed between the widow and her late husband ; and averred, that the sale in question was *bona fide* and valid, and for a good and valuable consideration. She denied, that the judgment set up as evidence of the plaintiffs' demand could have any effect against her, or that Berghel was in any manner indebted to plaintiffs ; that the debt on which it was obtained was barred by the prescription of five years, &c.

On these pleadings and issues the parties went to trial. There was a verdict and judgment in favor of the plaintiffs at the first trial, but which was reversed, and the case remanded by this court, at its April term, 1838. See 10 *Louisiana Reports*.

On the return of the cause, there was another verdict and judgment for the plaintiffs, and a new trial granted.

At the next trial there was a verdict for the defendant, which was approved by the court, and from judgment rendered thereon, the plaintiffs appealed.

The case turns entirely on a question of law, embodied in a bill of exceptions, and which is fully stated in the opinion of this court.

R. N. and A. N. Ogden, for the plaintiffs and appellants.

Elam, contra.

Bullard, J., delivered the opinion of the court.

This case was before us at a former term, and was then remanded for a new trial. (See 10 *Louisiana Reports*.) The result was a second verdict for the plaintiffs, which was set

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a judgment in her favor, the plaintiffs appealed.

A bill of exceptions, to which our attention has been drawn, shows, that on the last trial the plaintiffs offered Joseph Taquino as a witness, to prove that he had frequently presented the note on which the judgment was rendered against Gregorio Berghel, who had always acknowledged it to be his note, and promised to pay it; and that these acknowledgments and promises were made at different times, within five years from its maturity, to wit, in 1828, and afterwards and before the said Gregorio Berghel sold the property in question. That these acknowledgments and promises were made in presence of the defendant. The plaintiffs offered to prove further, by said witness, that the consideration of the note was a loan to Manuel Lopez. But evidence of these acknowledgments and promises was rejected, on the ground that the note was not first proved. Whereupon the plaintiffs' counsel offered the note in evidence, but its introduction was opposed, on the ground that there was a subscribing witness, whose signature should be proved. The plaintiffs then offered to prove the signature of the subscribing witness, by G. Berghel, who, on his *voire dire* stated, that he was the brother of the witness, and son of the defendant, whereupon he was objected to by this defendant as incompetent. It appears, that the subscribing witness was the son of the defendant, and the reputed son of the maker of the note, G. Berghel.

It is necessary to premise, that this court held, on the former appeal, that the defendant had a right to controvert the plaintiff's demand against her vendor, and even to avail herself of the same defence, which he had in vain set up. The answer of the defendant, among other things, denied that Berghel was in any manner indebted to the plaintiffs; and alleged that the note was prescribed; that no consideration was given, and that Berghel did not execute the note, and was in no measure liable to pay the same. There is a further plea of a prescription of three years.

We are of opinion the court erred in rejecting the evidence offered to prove the execution of the note by the repeated acknowledgments of Berghel. The note was signed by an ordinary mark, and attested by a witness, who was incompetent to testify in the case from his relationship to one or both of the parties. The evidence offered would have been better than the proof of the signature of the subscribing witness to an ordinary mark.

The case of *Plicque et al. vs. La Branche*, 11 *Louisiana Reports*, relied on by the defendant, was quite different from this. In that case, the signature was expressly alleged to have been forged and counterfeited, and we held, that evidence of acknowledgments was not sufficient. The proof offered in this case goes to show, that the defendant's vendor was indebted to the plaintiffs, at the time of the sale, by note, apparently prescribed, but which he had repeatedly admitted was still due, and promised to pay.

We have been asked to render a final judgment upon the evidence given on a former trial. This we think cannot be done. The statement of facts does not show that the same evidence was given on the last trial, and the case must go back for trial before another jury.

We are also of opinion, that the evidence of a witness since deceased, taken down in writing on a former trial, is admissible.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; that the case be remanded for a new trial, with instructions to the jury not to refuse to admit evidence of the repeated acknowledgments of G. Berghel, as set forth in the bill of exceptions, and that the appellee pay the costs of this appeal.

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Evidence of the repeated acknowledgments of the maker of a note that he would pay it, is admissible to prove its execution, when the subscribing witness is incompetent to testify, from his relationship to one of the parties.

But where the defendant expressly alleges his signature to the note sued on to be forged, evidence of his acknowledgments will not be admitted, under article 325, of the Code of Practice.

The testimony of a deceased witness, taken in writing on a former trial, is admissible in a subsequent one.

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MOONEY vs. CORCORAN.

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The amount of a judgment having been paid, the defendant therein took an appeal and had it reversed: *Held*, that he should recover back the sum paid, on showing these facts.

This is an action to recover back the sum of three hundred and twenty dollars, which the plaintiff alleges he paid to the defendant as the amount of a judgment and costs, which the latter had obtained against him in the District Court, but which was afterwards reversed on a devolutive appeal.

There was a plea admitting the judgment, but denying that it was ever paid by the plaintiff, as he alleges.

The plaintiff made out his case by proof, and had judgment, from which the defendant appealed.

Avery and Fowler, for the plaintiff.

T. G. Morgan, contra.

Bullard, J., delivered the opinion of the court.

This case turns altogether on questions of fact. The plaintiff sued to recover back a sum of three hundred and twenty dollars, which he had paid under a judgment rendered against him by the District Court, and which was afterwards reversed on appeal. The defendant's plea that there was a compromise by which the plaintiff obtained a release of that much of the judgment, and that, in fact, he did not pay the whole amount, appears to us as it did to the court below, not sustained by the evidence.

The judgment of the District Court is, therefore, affirmed with costs.

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The failure of one of the sureties to demand the benefit of division, at the trial, does not authorize a judgment *in solido* against him, but leaves him liable for the whole debt in case of the insolvency of his co-sureties.

In case a surety demands the benefit of division at the trial, judgment must be for his *virile* share, *absolutely*; it cannot be for a larger sum; but not having done so, he must remain *liable* in case of the future insolvency of his co-sureties.

This is an action against the makers and endorsers of six promissory notes, for five thousand five hundred and twenty-five dollars each, secured by mortgage.

The plaintiffs show that they are the holders of these six notes; two of which are signed by James Ogilvie, February 24, 1837, and made payable to the order of, and endorsed by John G. Banks, W. H. Sparks, and Thomas K. Price; and the four others signed by John G. Banks, of the same date, and payable to the order of and endorsed by James Ogilvie, W. H. Sparks, and Thomas K. Price; all of them payable in one and two years after date, for five thousand five hundred and twenty-five dollars each, making an aggregate sum of thirty-three thousand one hundred and fifty dollars, with interest and costs of protest, for which the plaintiffs pray judgment, *in solido*, against each name on and to the notes.

Banks and Ogilvie excepted to the jurisdiction of the Parish Court; the former averring himself a resident of the parish of Terrebonne, and the latter of the parish of Jefferson. There was judgment taken by default against the other defendants.

On making this judgment final, the act of sale of two large lots of ground, from Joshua Baldwin to John G. Banks, forming the consideration of the notes sued on, was produced in evidence, which showed they were given for one half of the price, marked *ne varietur*, and identified with and described in

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the act of sale and mortgage. J. Baldwin endorsed these notes in blank over to the Atchafalaya Bank, who are the plaintiffs, and he one of the defendants.

The evidence showed that all the other names on the notes, were for the accommodation of J. G. Banks, as vendee and purchaser of the lots in question from J. Baldwin.

There was final judgment entered against Thomas K. Price, J. Baldwin and W. H. Sparks, *in solido*, for the amount of the notes, interest, &c., from which Price, alone, appealed.

F. B. Conrad, for the appellant, contended :

1. The notes are drawn payable to the order of several who are not alleged to be partners. The interest of the payees, then in the notes and their right to transfer the same, were in all of them collectively, not in any one of them. Neither of them could assign more than his interest in the notes, that interest was one third of the amount, and the holder can surely never acquire nor claim more than the party could assign to him. The endorsement of the notes, therefore, is clearly a joint, not a solidary obligation, as much so as if the endorsers had in so many words stated, "we promise to pay," &c. The endorsement was a new contract, and the endorsers may be considered as joint makers of the notes. This court has, in a case precisely similar to the present one, already decided that such an endorsement created a joint liability, and that the endorsers can only be made responsible for their virile portions. See *Barrow vs. Norwood*, 3 *Louisiana Reports* 437, and the authorities there referred to by the court. This decision is in accordance with the principles established by the courts of England, and of our sister states, and is borne out by all the writers on the subject. See *Bayley on Bills*, (*American edition of 1826*) page 115, in which reference is made to the decision of this court in *Barrow vs. Norwood*. *Chitty on Bills*, page 123; *Thompson's Law of Bills of Exchange and Promissory Notes*, page 263; 3 *East's Reports*, 104; 3 *Bosanquet and P's Reports*, page 7.

2. It is contended, however, that though not liable as endorsers for more than the virile share, we are liable for the

whole as surety of the drawer. To this we answer, that plaintiffs have not sued us as sureties. We are charged in the petition as endorsers of the notes, and such in fact we are. Price has nowhere assumed the obligation of surety. He is not a party to the sale from Baldwin to Banks, and if liable at all, can only be liable as endorser of the notes. Besides, we are sued by a third holder of the notes. If we are sureties, we only are sureties to Baldwin, the vendor, and not to the plaintiffs. The case of *Freeland vs. Hodge*, 12 *Louisiana Reports*, 177, relied upon by plaintiff's counsel, was a suit instituted by the vendor against the vendee, and there this court held, that the endorser was only a surety.

3. We contend, moreover, that the plaintiff should have sued us as sureties, not as endorsers, and then, if we were sureties in any sense, we might have pleaded the right of discussion. The plaintiff by his own pleadings deprived us of that right, and he cannot now hold us in that light. We are, therefore, even as sureties, not liable *in solido*; the plaintiff not having shown the insolvency of any one of the other endorsers, and having himself precluded us from the plea of discussion: *Louisiana Code*, article 3018. This case, however, cannot be distinguished from that of *Barrow vs. Norwood*.

Hoffman, for the appellees, relied on the following points and authorities, in support of the judgment below.

1. The record shows, that the appellant's engagement was that of a surety of Banks: See *Louisiana State Bank vs. Senecal*, 11 *Louisiana Reports*, 29-30; that the endorser of an accommodation note is a surety: See the case of *Tulane vs. Wilcox*, 11 *Louisiana Reports*, 51-2; also, *Freeland vs. Hodge*, precisely this case, 12 *Louisiana Reports*, 179.

2 As surety he was properly condemned for the whole amount: *United States vs. Hawkin's Heirs*, 4 *Martin, N. S.* 320-1, and the authorities cited. The principles settled in this case have never been disturbed. These parties contracted since that decision was published, and are bound by the principles settled in that case.

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3. We say further, that from an examination of the whole transaction, it is evident that a joint and several obligation was intended by the parties.

C. M. Conrad insisted, that the defendants were only liable each one for his *virile* share, and that the judgment must be reversed.

Martin, J., delivered the opinion of the court.

The defendant, Price, is appellant from a judgment which condemns him, as one of the payees and endorsers of the notes sued on, jointly and severally with the others, to pay the amount. He contends that, as the note was not given in a mercantile transaction, the payees not being commercial partners, he was only bound to pay his *virile* part. The appellees urge, that the payees endorsed as sureties of the maker, in the purchase of a tract of land, and that they did not avail themselves at the trial of the right of demanding a division. The failure of one of the sureties to demand a division, does not authorize a judgment *in solido* against him, although it leaves him liable for the whole debt in case of the future insolvency of his co-sureties. The record shows, that the maker of the note gave it in payment of the purchase of a tract of land, after it had been endorsed by the payees. It is, therefore, clear that he was the owner at the time his vendor received the note, and that it had been endorsed for his accommodation. *Nolle et al. vs. Their Creditors*, 7 *Martin, N. S.*, 9.

The failure of one of the sureties to demand the benefit of division, at the trial, does not authorize a judgment of *in solido* against him, but leaves him liable for the whole debt in case of the insolvency of his co-sureties.

In case a surety demands the benefit of division at the trial, judgment must be for his *virile* share, absolutely; it cannot be for a larger sum; but not having done so, he must remain liable in case of the future insolvency of his co-sureties.

If the appellant had demanded a division, the judgment against him must have been for his *virile* share, absolutely. It cannot be for a larger sum; but he must remain liable in case of the future insolvency of his co-sureties. See *Louisiana Code*, 3018-19.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed; and proceeding to give such judgment, as in our opinion ought to have been rendered in the court below, it

is ordered, adjudged and decreed, that the plaintiff recover of the defendant and appellant, the sum of eleven thousand and fifty dollars, with interest on three thousand six hundred and eighty-three dollars and thirty-three and one-third cents, from February 27, 1838; and on seven thousand three hundred and sixty-six dollars and sixty-six and two-third cents, from February 27, 1839, at the rate of five per cent. per annum until paid, and the further sum of twelve dollars for costs of protest and certificates of notices, with mortgage on the property described in the said act, to secure the payment of this judgment, reserving to the plaintiffs their future rights, (if any) against this defendant and appellant in case of the insolvency of his co-payees, or either of them. The costs of the inferior court to be paid by the defendant, and those of the appeal to be borne by the plaintiffs and appellees.

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March, 1840.

JONES
vs.
MANSKER.

JONES vs. MANSKER.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
EAST BATON ROUGE, THE JUDGE THEREOF PRESIDING.

The statute of 1827, in relation to protests and notices, introduced few, if any, rules derogatory to the commercial law. It only provides new modes of proof of demand and notice to the parties to notes and bills of exchange, leaving their effect to be determined by the commercial law.

The rules laid down in the Code of Practice in relation to service of citations, have no application to the service of notices of protest of bills and notes.

A notice of protest left at the defendant's store, with his clerk, or on his desk, or thrust under his door during business hours, is sufficient to bind him as endorser.

This is an action against the endorser of a promissory note. The defendant admitted his signature, but denied his liability under his endorsement.

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At the trial, the plaintiff offered the protest and the notary's certificate of notice to the defendant, of the dishonor of the note, in evidence. The defendant's counsel objected: 1st. That neither of the documents purported to be a copy from the original on file. 2d. That the statement in the notary's certificate of the manner in which notice of protest was served, to wit: that "it was forwarded to the endorser, James Mansker, being delivered to his clerk at his store by the notary," is not evidence to prove to whom notice was delivered; or that the person to whom said notice was delivered, was the clerk of the said Mansker; or was authorized by him to receive notices of protest. These objections were overruled, and the documents admitted in evidence, and the defendant's counsel took his bill of exceptions. The court remarked that the objections went to the effect of the evidence, and not its inadmissibility.

The protest purports to be the original; and the certificate is attested by the notary as a true copy from the original on file in his office.

The court was of opinion the plaintiff failed to make out his case, and gave judgment of non-suit, from which the plaintiff appealed.

Brunot, for the plaintiff and appellant.

1. The notice of the dishonor of the bill is sufficient in this case to bind the endorser, the law requiring only such diligence as will ordinarily bring home notice to the party sought to be charged: See *Bank of the United States vs. Hatch*, 6 *Peters' Reports*, 256; *Steadman vs. Gooch*, 1 *Espinasse's Reports*, 4.

2. When the person to be charged has a dwelling and a counting house, or place of business in the same town, notice left at either of these places will be sufficient; the rule of law is, that if the holder of the bill has used such modes of communication as affords reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay, he has done all it requires. See *Bank of Columbia vs. Lawrence*, 1 *Peters' Reports*, 578; *Chitty on Bills* 488, and notes.

3. The statute of 1827, makes the certificate of the notary "evidence of all the matters therein stated," and he certifies that he delivered the notice to the clerk of the defendant, at his store; if the defendant had no store or clerk at the time, it was for him to prove, but he has not attempted to do one or the other, and the facts certified to by the notary are true and remain uncontradicted. See 1 *Moreau's Digest*, 96. EASTERN DIST.
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T. G. Morgan, for the defendant and appellee, insisted there was no error in the judgment, and that it should be affirmed. Protests should be recorded. 12 *Louisiana Reports*, 467.

2. The statutes of 1821 and 1827, are in *pari materia*, and must be construed together. They clearly show that the protest must be recorded. 7 *Louisiana Reports*, 162.

3. The statement of the notary, that he delivered the notice to the clerk of the defendant, is not evidence that the person designated was the clerk. 13 *Idem.*, 342.

Morphy, J., delivered the opinion of the court.

This case, which is a suit against the endorser of a promissory note, turns entirely on the sufficiency of the notice which the holder was bound to give him of the default of the drawer. The notary, in his protest and certificate executed in conformity with the statute of 1827, states, that on the day of the protest of this note, he delivered a written notice of such protest to defendant's clerk, at defendant's store, in the town of Baton Rouge. This is said to be insufficient. It has been contended, that the name of this clerk should have been given; that this statement of the notary is not evidence that the person designated was really the clerk of defendant; that by not giving the name, the notary has put it out of the defendant's power to disprove his statement. We have been referred to the provisions of the Code of Practice, in relation to the service of citations issuing from our courts, as furnishing safe and proper rules for the notaries to follow in delivering their notices of protest, and making out their certificates thereof.

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The statute of 1827, in relation to protests and notices, introduced few, if any, rules derogatory to the commercial law. It only provides new modes of proof of demand and notice to the parties to notes and bills of exchange, leaving their effect to be determined by the commercial law.

The rules laid down in the Code of Practice in relation to service of citations, have no application to the service of notices of protest of bills and notes.

A notice of protest left at the defendant's store with his clerk, or on his desk, or thrust under his door during business hours, is sufficient to bind him as endorser.

This court has frequently had occasion to express the opinion, that the law of 1827 introduced few, if any, new rules derogatory to the commercial law, on the subject of demands and notices on the drawers and endorsers of notes and bills of exchange; that it creates only an additional and peculiar mode of proving such demands and notices, leaving all questions about their sufficiency and legality to be determined by the law merchant. There is, perhaps, no subject on which uniformity in the laws and decisions among all the states of this Union is more desirable than the one under consideration. To apply the rules laid down in our Code of Practice, for the service of judicial citations, to the delivery of notices of protest of notes and bills of exchange, would be to overthrow at once, without reason or necessity, the whole doctrine of the *lex mercatoria* in these matters.

The general rule of the commercial law, applicable to the subject, has long since been settled, that if the parties reside in the same city or town, the endorser must be personally notified of the dishonor of the note or bill, or notice must be left at his dwelling house or place of business; either mode is sufficient. In this case notice was left at defendant's store, with his clerk. A store is such a place of business, where a notary might very properly look for the person to whom notice was to be delivered, or for some person authorized by him to receive it. The notary's certificate is *prima facie* evidence, under the statute, of all the matters therein stated, liable to be rebutted by other evidence. If the defendant had no store or clerk at the time, it was competent for him to show it, or to prove that his clerk, if he had one, was not the person who received the notice. This the defendant has not attempted to do: but even had the notary, finding no one in the store, left a notice on a desk, or finding the store closed, thrust it under the door, during business hours, the defendant could have no ground of complaint. *Steward vs. Eden*, 2 *Caine's Reports*, page 121. The obligation is to call at the dwelling house of the endorser, or at his place of business. If the endorser has left no one there to attend to his affairs, it is his loss, and the holder of the bill or note has done his duty and all that the

law demands of him. The rule is, that you must come as near to what is required as you can, and if the party has put it out of your power to do more, you have done what is sufficient. In the language of Judge Story: "the law does not require the highest and strictest degree of diligence in giving notice, but such a degree of reasonable diligence, as will ordinarily bring home notice to the party." But the sufficiency of a notice left in the hands of some one living in a dwelling house, or acting, apparently, as a clerk in a store or counting-house, seems now too well established to be questioned: *Bank of the United States vs. Hatch*, 6 Peters 257; *Franklin vs. Verbois et al.*, 6 Louisiana Reports, 729. We think that the plaintiff has shown himself entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding now, to give such judgment as should have been rendered below, it is further ordered and adjudged, that the plaintiff do recover of the defendant thirteen hundred and thirty-one dollars and eighty-seven cents, with interest at the rate of ten per cent. per annum from January 28, 1839, until paid, and costs in both courts.

LESASSIER VS. LESASSIER ET AL.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF IBERVILLE.

The Probate Court is without jurisdiction in an action against a third possessor of property sold by a tutor, when the object of the suit is to annul certain proceedings of that court releasing the general mortgage of the minor, and to subject the property to his claim, under his mortgage against the tutor.

The third possessor was no party to the probate proceedings sought to be annulled; is not connected in any way with the acts of the tutor; nor done any act under the authority of the court of probates.

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Courts of probate have no jurisdiction against third possessors of property claimed as part of a succession, or under a mortgage against a tutor. If it were otherwise, defendants would be deprived of important means of defence, as fraud and collusion, and the trial by jury.

This is an action by Luke Lesassier, late a minor, against Timoleon Lesassier, lately his tutor, to annul certain proceedings had in the Probate Court, in which T. Lesassier endeavored to release the general and tacit mortgage of the plaintiff, and give a special mortgage on certain property in lieu thereof. After the release thus effected, T. Lesassier sold a plantation and slaves, which had been previously effected by the general mortgage, to Addison Dashiell.

The plaintiff instituted this action to annul said proceedings of the Probate Court, alleging that his late tutor, T. Lesassier, is largely indebted to him, and that he still retains his general and tacit mortgage on all the property of his tutor, and that the plantation and slaves now in the possession of Dashiell are liable to his general mortgage. He prays that T. Lesassier and A. Dashiell be both cited; that the proceedings of the Probate Court, attempting to erase and release his general mortgage, be declared null; that his demand against his tutor be recognized, and that the plantation and slaves sold to Dashiell be seized and sold under his general mortgage to satisfy his demand.

A curator *ad hoc*, to represent T. Lesassier, who is absent, was appointed.

Dashiell appeared and excepted to the jurisdiction of the Probate Court, on the ground that he is a third person with reference to the plaintiff and the claims he sets up. He also answered generally and specially to the merits.

The parties went to trial on the merits, and after hearing the case, the judge of probates annulled all the previous proceedings, going to release the general mortgage of the plaintiff on the property of the tutor, and declared his mortgage in full force against all the property previously owned by his tutor, and from the time of the tutorship. The defendant, Dashiell, alone appealed.

Labauve, for the plaintiff.

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Winchester and Ives, for the appellant.

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Simon, J., delivered the opinion of the court.

The plaintiff alleges that during his minority, certain proceedings were had, at the request of his tutor, in order to discharge the tacit and legal mortgage which he had on the property of his said tutor, and to substitute thereto a special mortgage on certain property, which is far from being sufficient to satisfy his rights. That on his attempting to resort to his general mortgage on property in the hands of Addison Dashiell, who had acquired it from his former tutor, the third possessor thereof pretends to resist said legal mortgage on the ground that it has been extinguished and replaced by a special one on other property. Several grounds are set forth in the petition to show the irregularity and illegality of the proceedings, by virtue of which the general mortgage was cancelled. Plaintiff prays that his former tutor, and the third possessor be cited, in order that contradictorily with them, the proceedings complained of and the decree of homologation be annulled and set aside; and that the general mortgage resulting from the tutorship, be declared to have the same force and effect as if it had never been cancelled or released.

The defendants answered separately; the tutor pleaded the general issue, and A. Dashiell, after having filed a plea to the jurisdiction of the court, endeavors in an answer to the merits, to maintain the validity of the proceedings and of the judgment of homologation. There was judgment in favor of the plaintiff, against both defendants, and Dashiell, alone, appealed.

It becomes unnecessary to examine the merits of this action, which is one of nullity or rescission, as the defendant, Lesassier, did not appeal from the decision of the lower tribunal, which, as to him, has the effect of *res judicata*; and, as regards the defendant, Dashiell, this case is to be disposed of on his exception to the jurisdiction of the court.

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The Probate Court is without jurisdiction in an action against a third possessor of property sold by a tutor, when the object of the suit is to annul certain proceedings of that court, releasing the general mortgage of the minor, and to subject the property to his claim, under his mortgage, against the tutor.

The third possessor was no party to the probate proceedings sought to be annulled; is not connected in any way with the acts of the tutor; nor done any act under the authority of the Court of Probates.

Courts of Probate have no jurisdiction against third possessors of property claimed as part of a succession, or under a mortgage against a tutor. If it were otherwise, defendants would be deprived of important means of defence, as fraud and collusion and the trial by jury.

We think the judge *a quo*, erred in overruling the declinatory exception filed by Dashiell, and in assuming or maintaining jurisdiction over him. With regard to the plaintiff, and to the succession under which he claims his rights, the defendant, Dashiell, is a third person, and an entire stranger to the administration of the tutorship, and to the proceedings which may have been had relative thereto at the request of the tutor. It is true that the object of this suit is to annul a judgment of homologation of certain proceedings, by virtue of which, as it is alleged, property now in the possession of Dashiell, was released from the general and legal mortgage existing in favor of the plaintiff; but the third possessor was not a party to those proceedings, nor did he ever intermeddle in the administration of the tutorship; and he is not alleged, in any manner, to be connected with the acts of the person under whom he holds said property, nor has he done any act under the authority of the Court of Probates. Courts of Probates are courts of limited jurisdiction, and this court has held in the case of *Casanova vs. Acosta et al.*, 1 *Louisiana Reports*, 183, that "Courts of Probates have no jurisdiction against third persons to recover property belonging to a succession, and which had fallen into their hands. Although this suit is not to recover the property from Dashiell, it would have virtually the same effect, as its object is to deprive him of his property by virtue and means of a general mortgage. Were we to maintain the jurisdiction assumed in this case by the judge *a quo*, the defendant, Dashiell, might lose the benefit of very important means of defence which he may have, and which he could not properly urge before the Court of Probates; such as allegations of fraud and collusion and other like exceptions; and thereby would be also deprived of the trial by jury, the only competent judges in such matters.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, as it relates to the defendant, Dashiell, be annulled, avoided and reversed; that this suit be dismissed with regard to him, and that the plaintiff pay costs in both courts.

GILBERT ET AL. VS. NEPHER AND BOYLE.

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March, 1840.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH
OF EAST BATON ROUGE, THE JUDGE OF THE DISTRICT PRESIDING.GILBERT ET AL.
VS.NEPHER
AND BOYLE.

Where the plaintiffs discontinue their suit, and afterwards revive or renew it, on a rule to show cause served on the adverse party, and obtain judgment, which, although it is not appealed from, yet it will be deemed *insufficient* on which to found an action against a third possessor.

When a judgment is relied on as the only evidence of a debt, for which the property of a third possessor is attacked, it is but fair, and he has the right to open it, and inquire into the manner in which it has been obtained.

Where a judgment, set up as the basis of an action against third persons, is attacked as fraudulent and collusive, it devolves on the party offering it to prove his debt or demand by legal evidence.

The plaintiffs allege, that one Lloyd Gilbert was their tutor, who was largely indebted to them, and they obtained a judgment for the amount due, which gave them a lien or mortgage on all the property of the tutor; that the defendants are in possession of very valuable property in the town of Baton Rouge, which they obtained from Lloyd Gilbert, and which is, as they allege, subject to their mortgage.

The defendants aver that they are possessors and owners of the property under the will of one Ramon Mon, deceased. That the judgment under which the plaintiffs claim to have a legal mortgage, was obtained by fraud and collusion, and is on its face a nullity. They pray that the plaintiff's demand be rejected and they quieted in the possession of their property.

The character of the judgment set up as the basis of the suit, is stated and explained in the opinion of this court, and the facts and evidence concerning it need not be recapitulated.

There was judgment for the defendants, and the plaintiffs appealed.

Elam and Avery, for the plaintiffs and appellants.

Brunot, for the defendants.

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Morphy, J., delivered the opinion of the court.

This is an hypothecary action, in which a house and lot in the occupancy of the defendants, is sought to be made liable for plaintiffs' claim against their former tutor, Lloyd Gilbert, to whom said property belonged during the tutorship. The defendants aver that they are the possessors and owners of the property as universal legatees of one Ramon Mon; that the judgment on which plaintiffs rely as the evidence of their claim against their tutor was obtained through fraud and collusion. That it is null and void on the very face of the proceedings, having been rendered without citation or any defence, &c. The circumstances under which this judgment was pronounced by the parish judge of Ascension, are somewhat peculiar. It appears that an action had been brought by the plaintiffs against the estate of their tutor, before the probate judge, Carlin D'Outremer, the predecessor of the present incumbent; that the accounts had been partially audited and passed upon, when, on the 5th of April, 1827,

Where the plaintiffs discontinued their suit, and afterwards revive or renew it on a rule to show cause served on the adverse party, and obtain judgment, which, although it is not appealed from, yet it will be deemed insufficient on which to found an action against a third possessor.

When a judgment is relied on as the only evidence of a debt for which the property of a third possessor is attacked, it is but fair, and he has the right to open it, and inquire into the manner in which it has been obtained.

the plaintiffs obtained leave to discontinue their suit; that two years and a half afterwards, the plaintiffs re-appeared in the court of probates, where the present judge was then sitting, and took a rule on the curatrix of the estate of Lloyd Gilbert, to show cause why the suit should not be reinstated; on this rule the suit was revived and proceeded in *ex parte* by the judge, who went on to determine what he considered to be the remainder of the case. He then pronounced the judgment which forms the basis of the present action. We know of no law sanctioning such a course of proceeding. When a suit is discontinued, there is nothing before the court; but the party discontinuing is at liberty to bring a new action after paying the costs of the first suit. *Code of Practice, article 492.* When a judgment is relied on as the only evidence of a debt for which the property of a third possessor is sought to be made liable, it is but fair and just that it should be open to inquiry as to the manner in which it has been obtained. If, in contemplation of law, it be no judgment at all, the third possessor to whom it is opposed, has the undoubted right, under proper averments, to point out all

the nullities which he may discern in it, and disrobe it of that judicial garb which makes it *prima facie* evidence of the correctness of the claim set up against his property. But here the defendants have, moreover, pleaded against this judgment, that it was obtained through fraud and collusion. Under the repeated decisions of this court, such a plea has been holden to throw on the party claiming under a judgment, the burthen of proving the debt on which it was obtained. The plaintiffs having failed to make any such proof, we think that the judge below was correct in deciding that they should take nothing by their proceeding.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

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HEADEN.

Where a judgment, set up as the basis of an action against third persons, is attacked as fraudulent and collusive, it devolves on the party offering it to prove his debt or demand by legal evidence.

HEADEN VS. HEADEN.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF EAST BATON ROUGE, JUDGE MORGAN PRESIDING.

Where the wife claims a separation from bed and board, on the ground of repeated acts of ill treatment and cruelty by her husband, which is supported by evidence, and there is no hope of living in peace, she will be entitled to relief.

This is an action by the wife of Elisha Headen, for a separation of property and bed and board, on the ground of cruel and bad treatment, alleging that he struck and bruised her on more than one occasion, and is in the habit of maltreating her. She alleges, further, that there is no prospect of ever living in peace with her husband, and that she is entitled to have her paraphernal and separate property, together with her share of the acquets and gains set off and separated from that of her husband, and a separate domicile allotted to her. She prays judgment accordingly.

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The defendant denied generally, and specially averred, that even if the allegations in the petition were true, there was no cause of action set forth ; and further, that the plaintiff was guilty of excesses, cruel treatment and outrages towards him. He sets up claims and demands for property, that in case of separation, belongs to him exclusively.

Upon these pleadings and issues the cause was tried. There was much testimony adduced on both sides, and some of it contradictory. But it went to show the unhappy relations existing between the parties, and the utter hopelessness of ever living in peace with each other.

The district judge was convinced that a separation ought to take place, and entered into an elaborate examination of the evidence, both in relation to the cause of separation, and the respective claims of the parties to the property. There was a decree of separation and division of property. The husband being dissatisfied therewith, appealed.

Elam, for the plaintiff.

Brunot, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment of separation of bed and board.

This case, like most others of the kind, presents chiefly questions of fact. The record is voluminous, and the testimony multifarious and complicated. The district judge has taken a great deal of trouble in examining and weighing its different parts, and his judgment affords a lucid view of the facts on which the plaintiff grounds her claim, to a separation on account of violent and repeated acts of ill treatment and cruelty, which leave no hope of her finding, in the marital house, that tranquillity and peace which she had sought, and had a right to expect.

We concur in the conclusion to which the court below came, that her case entitles her to a judgment of separation.

With regard to the amount of property which the court *a qua*, allotted to her, she seeks no redress at our hands,

although her claim has been very much reduced. The defendant and appellant's counsel have not enabled us to discover that any injury has been done to him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BOB AND MILLY
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BOB AND MILLY ET AL. VS. NUGENT'S SYNDICS.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

Where certain slaves, in the hands of third persons, claim to be set free under the provisions of the will of their former master; his executor must be made a party. They have a right to stand in judgment, for the purpose of compelling the executor to emancipate them in pursuance of the provisions of the will, but this must be done contradictorily with him.

This is a suit instituted by Bob and Milly, colored persons, and their seven children, to recover their freedom under the will of Timothy O'Hara, their former owner, and who made his will and died in the state of Mississippi, where the plaintiffs were at the time of his death. John Nugent and two other persons were named testamentary executors in the will. Nugent alone qualified; and shortly afterwards removed with these slaves into this state, and settled in the parish of Iberville, where he failed in business, and surrendered the present plaintiffs, as his slaves, to the syndics appointed by his creditors. They are alone sued in this action, and deny that the plaintiffs have any right to claim their freedom.

The following is the extract of the will relied on:

"Item: It is my will and desire, that my following negroes be set free, to wit: Bob, and Milly his wife, and her seven children, &c., be set at liberty, and have their freedom, that is to

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say, Bob and Milly at my death, and the seven children when the youngest of them living, shall have attained the age of ten years ; and in case the laws of the state of Mississippi should not admit them to be emancipated, I desire and enjoin it on my executors, or any one of them, at the period of the youngest child, as aforesaid, living at the time, shall have arrived at the age of ten years, to carry or send them all into the state of Ohio, in order that their freedom may be established, and afterwards to bring them again into this state, (Mississippi) in case the laws of this state will admit them, and they, themselves, desire it."

"Item : It is my will and desire, that the sum of one hundred dollars be paid, by my executors, to each of the negroes before named after their freedom is established as aforesaid."

"Item : It is my will and desire, that the necessary expenses attending the emancipation of the said negroes, or in taking them to the state of Ohio, as before directed, be paid out of the proceeds of my estate, and also the expenses of bringing them back again to this state."

"Item : I give and bequeath to John Nugent, of the town of Washington, (Mississippi) all the rest and residue of my estate : Provided, he shall take or send the negroes before mentioned into the state of Ohio, for the purpose of establishing their freedom as aforesaid, &c."

The testator annexes a condition, that in case John Nugent should fail to emancipate said slaves, as required, then he gives the residue of his estate to Matthew Bowles, of Jefferson county, (Mississippi) and on his failure, he gives it to William L. Chew, of Adams county, (Mississippi.) The will is signed by Timothy O'Hara, he making his ordinary mark, March 5, 1824. It was duly admitted to record, in Adams county, Mississippi.

The district judge decreed the plaintiffs their freedom, under the will, and the syndics appealed.

Labauwe and Ogden, for the plaintiffs and appellees.

Winchester and Ives, for the defendants and appellants.

Martin, J., delivered the opinion of the court.

The plaintiffs are people of color, and claim their freedom under the will of one Timothy O'Hara, late a resident of the state of Mississippi; and they allege, that one John Nugent, a testamentary executor of the said Timothy O'Hara, deceased, contrary to the provisions of said will, brought them to the state of Louisiana, as his slaves, and placed them as such on his bilan. They have instituted this suit against the syndics of Nugent, demanding their freedom under the provisions of the will of their former owner.

The syndics resist their claim, under the plea of the general issue; and aver, that they are part of the property surrendered by the insolvent; and further, urge that their emancipation under the will is absolutely null, having been made contrary to a law of the state of Mississippi, in which the will was executed. The plaintiffs had judgment, and the syndics appealed.

The testator required his executor to emancipate the plaintiffs, if this could be legally done, under the existing laws; otherwise to remove them to the state of Ohio. This direction of the will could only be carried into effect with the consent of the legislature. *Revised Code of Mississippi Laws*, page 385-6, section 75.

The executor made no attempt to obtain the consent of the legislature, but removed with the slaves to this state, where he procured money on a mortgage upon them.

It is clear that the plaintiffs did not cease to be slaves and part of the estate of their former master while they were in the state of Mississippi, and it is not pretended, that the formalities which the law requires for the emancipation of slaves in this state, have been fulfilled in regard to them: Nevertheless, they have a right to stand in judgment for the purpose of compelling the executor to emancipate them, in pursuance of the provisions of the will, but this must be done contradictorily with the executor. He, alone, is able to show whether the emancipation can take place without injury to the creditors of the estate of his testator; or that there are other just grounds which justify his refusal. The syndics

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Where certain slaves, in the hands of third persons, claim to be set free under the provisions of the will of their former master, his executor must be made a party. They have a right to stand in judgment, for the purpose of compelling the executor to emancipate them in pursuance of the provisions of the will, but this must be done contradictorily with him.

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**MIX'S ABSENT
HEIRS
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**MIX'S EXECUTOR
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have an interest adverse to the claim of the plaintiffs, as their emancipation will diminish the property surrendered by the insolvent, for the payment of the creditors ; but they cannot be listened to in the absence of a representative of the estate of the testator or his heirs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment for the defendants as in case of non-suit.

MIX'S ABSENT HEIRS VS. MIX'S EXECUTOR AND LEGATEES.

**APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF
POINTE COUPEE.**

The attorney of absent heirs cannot institute a suit against the testamentary executor and legatees, to annul the will of the testator. His functions are essentially conservatory.

The attorney of absent heirs, may, and perhaps generally does, represent the legatees named in the will, when any of them are absent ; hence the absurdity of his suing to annul the will, and with it, their legacies.

This is an action instituted by the attorney of the absent heirs of James H. Mix, deceased, to annul his last will and testament.

On the 26th of May, 1839, J. H. Mix made his olographic will, in which he bequeathed his plantation in Pointe Coupée, and several slaves, to one Ferdinand Miller, a youth he had raised, to be delivered to him by the executor when he should arrive at the age of majority, and in the meantime he was to be educated at the discretion of the executor. He also gave a legacy in slaves to his sister, Harriet Mix, and her daughter,

of New-Haven, in Connecticut, and the balance of his property he gave to his nephews and nieces, if any there were living, to be equally divided between them. He gave, likewise, special legacies of one hundred dollars each, to his sister and daughter, and to a Mrs. Wooster, for her care and attention to his mother. D. Turnbull was named testamentary executor; and, on his refusal, A. Bourgeat was appointed dative testamentary executor. On making probate of the will, E. Stevens, attorney at law, was appointed to represent the absent heirs; and deeming the will illegal and null for want of the proper legal formalities, commenced suit as attorney of absent heirs, against the executor and all the legatees, to have the will annulled and declared void.

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The defendants pleaded a general denial, and averred that the will is valid.

The judge of probates took up the subject on its merits, and rendered judgment against the demands of the plaintiff, and made the executor pay costs out of the funds of the estate. The plaintiff appealed.

Stevens, in *propria persona*, as appellant, insisted that no objection could be taken to the form of the action in the Supreme Court, when it had not been made in the court below and specially pleaded. On the merits, he contended that the will was null and void on its face, and could not stand.

L. Janin, for the defendants and appellees, objected to the right of the attorney of absent heirs, to institute a suit like this; and, also argued the case at length on the merits, insisting that the will is valid in every particular.

Bullard, J., delivered the opinion of the court.

This is an action brought by the counsel appointed by the Court of Probates, in virtue of article 1654, of the *Louisiana Code*, to represent the absent heirs of the testator, against the legatees and the testamentary executor, in order to cause the testament to be declared null on various grounds. Most of the legatees reside abroad, and they, together with a minor

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The attorney of absent heirs, may, and perhaps generally does, represent the legatees named in the will, when any of them are absent; hence the absurdity of his suing to annul the will, and with it, their legacies.

living in the state, to whom the testator bequeathed a considerable portion of his estate, are represented in these proceedings by a curator *ad hoc*.

Although the case on its merits presents no difficulty, yet we view the proceeding as so novel, that we are induced to consider whether the counsel of absent heirs in this case has any legal authority to institute such a proceeding, to provoke an inquiry into the validity of a testament contradictorily with legatees, and an instituted heir. The article of the code which defines his powers, says, that "when, of the testator's heirs, some are absent and not represented in the state, the judge shall appoint for them a counsel, whose duty it shall be to assist, for them, at the inventory, &c., to take care of their interests, and to oppose every thing which may prejudice the same." The next article makes it his special duty to correspond with those whose interests he is to protect. The counsel of absent heirs in vacant successions, *ab intestato*, are endowed with larger powers by a previous part of the code, (article 1204, *et seq.*) They are expressly authorized to institute certain suits of a conservatory character. The reason of this difference appears to us obvious. When the deceased has left a testament, the general interest of the estate is supposed to be confided to an executor, and it is not, perhaps, to be presumed that his legal, differ from his instituted heirs. The attorney appointed to represent the absent heirs may, and, perhaps, generally does represent the legatees named in the will when any of them are absent. In such a case, the absurdity of his suing them to annul the legacies, is too glaring to require any comment.

But, independently of this incongruity which might arise, and does, for aught that appears to the contrary, actually exist in this case, it appears to us that a general authority "to take care of the interests of the absent heirs and to oppose every thing which may prejudice them," does not embrace the right *standi in judicio*, for any other purpose. His functions appear to us essentially conservative, and, in our opinion, the legislature never intended to authorize him to originate litigation either among the heirs themselves, or

between them and the legatees, and that a judgment pronounced in such a case, could not have, as to them, the authority of *res judicata*.

The judgment of the Court of Probates, is, therefore, affirmed with costs.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ISBERVILLE.

A clause in a testament which extends the powers of executors in their mere capacity as such, to enable them to keep the funds of the succession in their hands, after they have become *functi officio*, ought to be considered as *not written*.

Where the testator appointed his executor also tutor of his minor child, and directed that he keep the share of his child until he became of age, and the executor renounced the tutorship: *Held*, that he is bound to pay over the funds of the minor to the tutor afterwards appointed, as soon as his executorship ends.

The new tutor is bound to invest the funds as provided in the will, as the power of administering the estate of a minor is exclusively given, by law, to the tutor.

The attorney for absent heirs cannot interfere with the person or share of an estate coming to a minor heir, while he is under the direction and care of a tutor.

Provisions in a will appointing a tutor to the sole minor child, and also directing him to be sent out of the country to his grand-parents until he comes of age, cannot both be executed. If the minor be put under a tutor, he must remain here until majority.

This is an action by Thomas B. Percy, tutor of the minor Provan, against H. D. Richardson, testamentary executor of

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William Provan, deceased, to compel him to account and pay over to him, as tutor, one-half of the net proceeds of the estate of the deceased, according to the provisions of the will. He prays for a partition of said succession, and that the attorney of absent heirs be cited to appear and become a party thereto.

The executor averred, that he had rendered his account in due season, and his term had been prolonged ; that there was a certain balance in his hands, which he accounted for ; but that, by the provisions of the will, it was made his duty to invest the whole of the proceeds of the estate in some good and secure stock, one half of which is bequeathed to said minor, and the other half in usufruct, to the father and mother of the deceased, in Scotland, and in full property to his three sisters. That the minor's portion is to remain untouched until his majority ; the revenues only to be taken and used for his support and education. He prays to be allowed to keep the proceeds of the succession, invest it in stock, and pay over the revenues to the heirs and legatees entitled thereto.

The attorney for absent heirs joined in the call for a final account and partition of the succession, but denied that the plaintiff had any right to the custody of the minor, or the administration of his property ; but that, under the provisions of the will, the minor was to be sent to his grand-parents in Scotland, to be educated and brought up. He prays that the tutor be required to comply with this provision of the will, and that until this is done, the estate remain in the hands of the executor.

Upon these pleadings and issues the case was tried. The facts of the case, and the provisions and clauses of the will, are fully set out and stated in the opinion of this court.

The judge of probates homologated the executor's account, and ordered him to pay over one half the net proceeds of the estate to the plaintiff, as tutor of the minor Provan. The executor, and attorney for absent heirs, both appealed.

I. Johnson and *Turner*, for the plaintiff and appellee, insisted on the affirmance of the judgment. The tutor had the right to the administration of the minor's estate, and not

the executor. The will was framed in the expectation of the executor being also tutor, and of course would have had a right to the possession of the minor's share ; but having renounced the tutorship, he is no longer entitled to the administration or possession of the property.

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Benjamin and *W. E. Edwards*, for the appellants, argued to show that the executor should not pay over the funds to the tutor: They contend :

1. The executor holds a sum of money which the tutor demands from him. The will says : " I hereby order that all the money arising from the sale of my property, after, &c., be invested in some good and secure stock, and the interest or dividends to be disposed of as follows," &c. The executor deems it his duty to follow out this provision of the will by investment of the money in his hands in some good and secure stock, under the advice of a family meeting, and with the sanction of the judge.

2. *Prima facie*, and as a general rule, it will no doubt be admitted, that an executor is bound to obey the directions of the testator, in the disposal of his property, unless, therefore, the tutor can show that this order of the testator is improper or illegal, it must be obeyed by the executor. How is this alleged illegality attempted to be shown ? The tutor argues that as regards the forced portion, the testator has no control, and, therefore, could not direct any particular investment of it. In order to see whether this argument is well founded, we must examine the provisions of the law, keeping in view the fundamental principle, that laws which prohibit the free disposal of one's own property must be strictly construed, and cannot be extended by implication. See the cases of *Cole* vs. *Cole's Executors*, 7 *Martin, N. S.*, 71, 414. The article which gives a forced portion is No. 1480, of the *Louisiana Code*, and is conceived in these terms : " Donations *inter vivos* or *mortis causa*, cannot exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child."

3. In the present case, the testator has only disposed of half of his property in favor of his ascendants and sisters,

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and has bequeathed the other half to his child. The will is, therefore, clearly valid under the terms of the law. Now we do not pretend to argue that the testator could do that indirectly which the law prohibits his doing directly. And if, under pretext of directing a particular mode of investment, he had so affected the rights of his child as to diminish their real value to an amount below the forced portion, we admit that in proof of such fact, such disposition of the will could be set aside.

4. But in the present case no such attempt is proved nor even alleged. It is not pretended that this was not a *bona fide* attempt of deceased, with paternal solicitude, to place the property of his child beyond the reach of accident. We can find nothing in the law which prohibits this, nor is such a doctrine taught by any of the authorities cited by plaintiff.

5. In conclusion, the court will remark that this is not a suit to set aside the will; that the will has never been attacked; that by the plaintiff's petition the defendant is called on to render an account under the will as executor; and when he offers to do so by carrying into effect the very terms of the investment, plaintiff attacks the dispositions as illegal, and obtains a judgment of the court below, directing him to do the very reverse of that which the will requires.

Simon, J., delivered the opinion of the court.

This is a suit against an executor, to account, and against the attorney for the absent heirs of the deceased, for a partition of the estate.

Dr. William Provan died in the parish of Iberville, leaving only one child. By his will, he disposes of one-half of his estate in favor of his son, and of the other half, in favor of his parents; after their death, their half is to go to the testator's three sisters. The testament contains, also, several special legacies, and provides for the payment of debts, &c. The testator appoints John Henderson and the defendant, Richardson, as his testamentary executors, and as tutors to his son, imposing upon them certain duties and obligations, which he explains in his will, and particularly expresses the wish, and

instructs his executors, that his son should be sent to his grand-parents, residing in the city of Glasgow, Scotland, to be placed under their charge and protection; and finally orders, that the whole of his estate, after delivery of the legacies, be sold; that the proceeds be invested as by him directed, and that the funds so invested, remain under the control of his executors until the age of majority of his son, under the obligation of disposing of the annual revenues for the use of the minor, in case of sufficiency.

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One of the executors declined accepting the trust; the defendant, Richardson, on accepting the executorship, refused to act as tutor to the minor, and the plaintiff, who is one of his maternal relations, was regularly appointed tutor.

The defendant, Richardson, answers that he is willing to render his account, but avers, that the plaintiff has no right to receive the funds belonging to the minor, the will of the deceased having provided in what manner and by whom said funds should be invested and administered. He prays that his account be homologated, and that he be authorized to continue in possession of said funds, in his capacity of executor, according to the will.

The attorney for the absent heirs joins the plaintiff, so far as relates to the rendition of an account, and pleads that plaintiff has no right to claim the tutelage and personal possession of the minor; that under the will, he is to be sent to his grand-parents, and that until this is complied with, the tutor cannot take possession of any part of the estate of the minor. He prays that this clause of the will be ordered to be executed.

The Court of Probates gave judgment in favor of the plaintiff, and the defendants both appealed.

It appears to us perfectly clear, that the defendant, Richardson, cannot, as executor, keep in his possession and administer the estate of the minor; this is not one of the powers and privileges given by law to testamentary executors, and any clause in a testament which would extend their powers in their mere capacity of executors, to keeping the funds of a succession in their hands after they have become *functi officio*,

A clause in a testament which extends the powers of executors in their mere capacity as such, to enable them to keep the funds of the succession in their hands, after they have become *functi officio*, ought to be considered as not written.

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Where the testator appointed his executor also tutor of his minor child, and directed that he keep the share of his child until he became of age, and the executor renounced the tutorship: *Held*, that he is bound to pay over the funds of the minor to the tutor afterwards appointed, as soon as his executorship ends.

The new tutor is bound to invest the funds as provided in the will, as the power of administering the estate of a minor is exclusively given, by law, to the tutor.

The attorney for absent heirs cannot interfere with the person or share of an estate coming to a minor heir, while he is under the direction and care of a tutor.

A provision in a will appointing a tutor to the sole minor child

ought, in our opinion, to be considered as not written. *Louisiana Code*, articles 1652, 1653, 1659, 1661, 1662, 1663, 1665, and 1666. In this case, however, we do not believe that the testator intended that the defendant should have the estate of the minor under his control as executor; for he has taken good care to appoint him tutor to his son; and we understand the clauses of the will concerning the estate of the minor, to remain under the control of the executor, as being written only for the purpose of indicating in what manner, as tutor, he is to administer the estate of his ward.

The defendant, Richardson, having no right, as executor, to keep in his possession the funds of the minor, and having refused to accept the testamentary tutorship, is bound to pay over into the hands of the plaintiff, regularly appointed tutor, the portion of the funds of the minor, proceeding from the sale of the property of the testator, and it will become the duty of the new tutor to invest said funds as provided for by the will. The power of administering the estate of a minor, is exclusively given by law to the tutor. *Louisiana Code*, 344 and 327. But, we see no reason why he should not, in his administration comply with the instructions given in the will by the testator; there is nothing in them repugnant, or contrary to the laws of the state.

We are unable to perceive any right in the attorney for the absent heirs and legatees, to demand that the minor be expatriated; he has no such power under the laws of the state; the object of his appointment is to take care of the interests of the absent heirs, and to oppose every thing which may turn to their personal prejudice and not to the prejudice of others. *Louisiana Code*, articles 1654, 1655. Were the minor's grand-parents residing in the state, they would be entitled to the *tutelle légitime*, but being absentees, they cannot claim it by proxy, or through their attorney; the law has never intended that the tutor of a minor, who is in the state, might reside in another country. *Louisiana Code*, 351.

It is, perhaps, proper to notice the clause of the will relative to the expatriation of the minor, but we are unable to see how it can be enforced; the duties, powers and privi-

leges of the tutor, under our laws, cannot be divided; he is to have the care of the person of the minor, and it cannot be taken from him. This subject might, perhaps, be properly submitted to the deliberation of a meeting of the family of the minor, who would authorize the tutor to conform to the wish of the testator, but in case of refusal on the part of the tutor, our courts would be without authority to order it, and without power to enforce their decree.

We do not think that this is such a case as damages for a frivolous appeal ought to be granted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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and also directing him to be sent out of the country to his grand-parents until he comes of age, cannot both be executed. If the minor be put under a tutor, he must remain here until majority.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Under the Roman law, no resolutive condition was implied in the contract of sale. If the *pactum commissorium*, was not expressly stipulated, the vendor had no right to take back his property if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void.

If, after the expiration of the stipulated time, the vendor sued for the price, he was considered as acknowledging the sale, and precluded from treating it as a nullity; or recovering back his property.

Under the Louisiana law, the effect of the *resolutive clause* implied in all synallagmatic contracts, is not to render the contract void, *ipso facto*, but only *voidable*, on the demand of the party complaining. There is, therefore, no inconsistency in suing for the *rescission* of the sale, after having claimed the price without success.

So, where the vendors sued the vendee for a specific compliance with the terms of adjudication, and payment of the price, and failed to enforce payment: Held, that an action for a rescission of the sale afterwards, was well brought.

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This is an action instituted by the plaintiffs as vendors of a tract of land or lot of ground, against their vendee, after having failed in several attempts to compel a compliance with the terms of adjudication and payment of the price, to rescind the sale. This case has been several times before this court. See 6 *Louisiana Reports*, 543; 8 *Idem.*, 577; 12 *Idem.*, 34.

In these several cases, all the facts material to the present case are fully stated, except that in the first one, the plaintiffs claimed a strict compliance with the terms of sale, and had judgment. In the second, they resorted to the executory process in the Parish Court, to enforce the judgment they had obtained in the District Court, and failed. The third case came up on a monition to perfect the sale of the land, or lot in question, under the first judgment and execution which issued thereon; upon which the defendant, Copeland, intervened and defeated the sale. The plaintiffs, after these repeated failures to enforce the original sale and effect payment of the price, have now sued for a rescission of the contract of sale, and a return of the property.

The defendant excepted to the right to sue for a rescission of the sale, after having attempted to enforce the contract; and also claims heavy damages, in reconvention, for the losses he has sustained in consequence of being kept out of possession, and deprived of selling the property at a great price and large profit.

There was judgment sustaining the defendant's exception to the action for a rescission, and rejecting his demand in reconvention. The plaintiffs appealed.

Slidell, for the plaintiffs.

Hennen and *Deslir*, for the defendant.

Morphy, J., delivered the opinion of the court.

On the 1st of May, 1833, the plaintiffs offered for sale at auction a certain tract of land near the village of Carrollton, which was adjudicated to the defendant, the last and highest bidder, for twenty-six thousand five hundred dollars, payable

one-tenth in six months, one-tenth in twelve months, for notes satisfactorily endorsed, with mortgage; and the residue of the price in two, three and four years, for notes secured by mortgage, but without endorsers. This adjudication has been a fruitful source of litigation in our courts, and the history of all the proceedings had in relation to it may be traced in 6 *Louisiana Reports*, 543; 8 *Idem.*, 577, and 12 *Idem.*, 42. For the purpose of this opinion, it will suffice to state, that the defendant having failed to comply with the terms of this adjudication, suit was brought by plaintiffs to enforce a specific execution of it, and they obtained a judgment, decreeing the defendant to pay in cash the first instalment, which, in the meantime had matured, and to furnish his notes for the balance, in conformity with the terms of the sale. The defendant never having complied with this decree, notwithstanding various attempts made by the plaintiffs, from time to time, to enforce its execution, the present suit was brought to obtain the rescission of the adjudication itself. The defendant excepted to the plaintiffs' right to bring this action, and claimed, in reconvention, heavy damages, on the ground that they had acted illegally and oppressively towards him, in the several proceedings by which they endeavored to execute their judgment, depriving him of the possession of the property for a long time, and thereby preventing him from realizing large profits on the same, &c. The judge below sustained the defendant's exception, to the right of plaintiffs to sue, but dismissed his claim for damages in reconvention. From this judgment, the plaintiffs alone have appealed, and the defendant has not prayed for any amendment of it. The only question, then, presented by this appeal, is the correctness of the opinion of the judge below, sustaining the defendant's exception to the plaintiffs' right of action.

It is urged that, by bringing suit and obtaining judgment for the price of the land sold, the plaintiffs have debarred themselves from the right of demanding, as they now do, a rescission of the sale. The maxim *electâ unâ viâ non datur recursus ad alteram*, has been relied on as decisive; and a

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Under the Roman law, no resolatory condition was implied in the contract of sale. If the *pactum commissorium*, was not expressly disputed, the vendor had no right to take back his property, if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void.

If, after the expiration of the stipulated time the vendor sued for the price, he was considered as acknowledging the sale, and precluded from treating it as a nullity, or recovering back his property.

Under the Louisiana laws, the effect of the resolatory clause implied in all synallagmatic contract void, *ipso facto*, but only voidable, on the demand of the party complaining. There is, therefore, no inconsistency in suing for the rescission of the sale, after having claimed the price without success.

number of respectable authorities quoted to show its various applications in different contracts and especially that of sale. The law 7, *D., de Lege Commissoria*, on which these writers have commented, and in relation to which they cite the above maxim, reads thus: "*Post diem, legi commissoria præstitutum, si venditor pretium petat, legi commissoria renuntiatur videtur, nec variare et ad hanc redire potest.*" The authorities cited at bar would no doubt be entitled to much respect, if the contract of sale was not governed in this country by rules materially different from those of the Roman jurisprudence on the same subject. It is well known that in the Roman law no resolatory clause was implied in the contract of sale. If the *pactum commissorium* was not expressly stipulated, the vendor had no right to take back his property when the price was not paid; but when such a stipulation was made in the sale, if at the appointed time, the price was not paid, the sale was completely void. From that moment, the property was considered as *inempta*, and the vendor could take it back as his own by a simple action of revendication; but if after this expiration of the stipulated time, the vendor once sued for the price, he thereby acknowledged the existence of the sale and precluded himself from the right he had under the *pactum commissorium* of treating it as a nullity and claiming back his property. See 1 *Troplong, verbo mortgage, No. 224*; 2 *Idem., on Sale, No. 655 and 656*. *Merlin's Questions de Droit, verbo Option*. Thus it is seen, that the *pactum commissorium* of the Romans, produced effects quite different from those of the resolatory clause, which our law implies in all synallagmatic contracts. The effect of the latter is not to make the contract void *ipso facto*, but only voidable on the demand of the party complaining of a breach of it. *Louisiana Code, article 2041*. Until avoided, the sale has always been and remains in full force. There is, then, under our law, no inconsistency in suing for the rescission of a sale, after having claimed the price without success. One of the most enlightened jurists of France, in commenting on the provisions of the Napoleon Code, which are very similar to those of the Louisiana Code on this subject, says: "*Il est*

certain que, dans les cas où la clause résolutoire n'est que sous entendue l'action en résolution de la vente peut encore être exercée après que le vendeur a vainement tenté, par l'action en paiement du prix, de forcer l'acheteur à remplir ses engagements." Merlin's Questions de Droit, verbo Option. 17 Sirey, part 2, page 1. The maxim then *undâ viâ electâ, non datur recursus ad alteram*, cannot apply to the rights of a vendor under our law.

It is not, moreover, to be found within any text, as a general rule; and its application must be restricted to the particular cases mentioned in the Roman law, in which we find the contrary proposition laid down as the general rule, "*nunquam actiones, de eâdem rē concurrentes, alia aliam consumit*." Law 130 d., l. 50, tit. 37, de R. J.

Let us now examine the provisions of our own law in relation to the rescission of contracts by reason of their inexecution by one of the parties.

The Louisiana Code, article 1906, declares that the putting in default is a pre-requisite to the recovery of the damages, or to the rescission of a contract.

Article 1905, points out the various modes in which a debtor may be put in default; one of them is "by the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing," &c.

From the above articles, it should seem that a previous suit for the specific performance of a contract, far from being a bar to a subsequent action for its rescission, is by our law considered as one of the preliminary steps to be resorted to. How then, under any maxim of law, can it be said to imply necessarily a renunciation of the right to sue for a rescission.

Our attention has been drawn to article 149, of the Code of Practice, as having a direct bearing on this question. This article contains one of those rules of practice which would be enforced by courts of justice, even were they not written in the law, because they are founded in common sense, and result from the very nature of things. Had this article been entirely omitted in the Code, would our courts suffer suitors

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to ask of them, at the same time, two things contrary to and exclusive of each other? would they not necessarily compel them to make an election from the very impossibility of granting two inconsistent demands; but, because two remedies, which are exclusive of each other, such as the performance of a contract and its rescission, cannot be asked for simultaneously, it by no means follows that after the one has been tried and found unavailing, the other cannot be resorted to, or that a recourse to one remedy implies a renunciation of the other. It must not be forgotten, also, in considering the bearing of article 149, of the Code of Practice, on this case, that the suit brought and the judgment obtained by the plaintiffs, is not for the price of the property sold, but for the specific performance of the adjudication. It is true that it draws the payment in cash of the first installment, because it would have been idle to order the defendant to make his note payable at a time already gone by; but this circumstance does not change the nature of the judgment under which no execution could issue for the price. It might be said that article 636, of the Code of Practice, points out the manner of enforcing judgments of this kind. It provides, it is true, that an order to the sheriff may be obtained to distrain all the property moveable and immoveable, of the party who is in default, until he shall have complied with the judgment. This remedy may be a very effective one against the contumacious wealthy, and large property holders, but in most cases must be found altogether inadequate. It could not in any way have assisted the plaintiffs, for we find in the record a *fiери facias* as that issued against the defendant for the first installment, returned "no property found." Upon the whole we are of opinion that the judgment obtained by the plaintiff is no bar to the present action, and only had the effect of putting the defendant more completely *in mora*, than the mere commencement of a suit having neglected and refused for years to carry this adjudication into effect, although solemnly decreed to do so, the defendant cannot, with good grace, complain of being now relieved from the obligation of executing it.

The judgment rescinding the adjudication to the defendant, will, of necessity, supersede and render inoperative the claim ordering a specific performance of the adjudication.

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It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and this court proceeding to give such judgment as in its opinion should have been rendered below, it is ordered and decreed, that the sale and adjudication made to the defendant on the first of May, 1833, of the property described in the plaintiff's petition, be rescinded and annulled; and that the defendant pay the costs of both courts.

So, where the vendors sued the vendee for a specific compliance with the terms of adjudication, and payment of the price, and failed to enforce payment: *Held*, that an action for a rescission of the sale afterwards was well brought.

STATE OF LOUISIANA VS. JUDGE OF THE PARISH COURT.

ON AN APPLICATION FOR A MANDAMUS.

Previous to the promulgation of the Louisiana Code, and Code of Practice, the appointment of a curator *ad hoc* to an absentee, was not authorized by law.

In an action of nullity, brought by the defendant therein, to annul a judgment obtained against him, as a citizen of this state, by *foreign creditors*, who never resided or owned any property in Louisiana: *Held*, that the suit be sustained by the appointment of a curator *ad hoc* to the absentees.

This case comes before the court on an application for a *mandamus*, commanding the parish judge, to appoint a curator *ad hoc*, to certain absentees, who are made defendants in a suit, pending in this court.

The record shows, that William De Forest Holly and others, non-residents and foreigners, obtained a judgment against Eugene Ory, in the Parish Court for the parish and city of New-Orleans. Ory, believing this judgment to be

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unjust, illegal and null, instituted his action of nullity against the plaintiffs therein, in the same court, to annul and set it aside. The plaintiffs in that judgment, became defendants in this suit; and being non-residents, never having resided, or held property of any kind, in this state, a curator *ad hoc* was prayed for to represent said absentees, on filing the petition. The parish judge refused to make the appointment on several grounds, and was of opinion that such an action could not be sustained.

Grandment, for the plaintiff, applied to this court for a *mandamus*, to compel the parish judge to make the appointment of curator *ad hoc*, as prayed for.

A rule to show cause was taken on the judge, who appeared and showed for cause, the grounds stated in the opinion of this court.

Simon, J., delivered the opinion of the court.

A rule having been taken on the judge of the Parish Court, to show cause why a *mandamus* should not issue, commanding him to appoint a curator *ad hoc*, to defend Wm. De Forest Holly et al., in a suit instituted against them by Eugene Ory, and pending in his court, he showed for cause: 1st. That the rule has been taken at his suggestion, in order to obtain the opinion of this court upon a point of legal practice on which a great deal of doubt and difference of opinion seem to exist. 2d. That the suit instituted by Eugene Ory, has for its object to obtain the nullity of a judgment rendered in favor of the actual defendants against him; that an action of nullity is separate and distinct from that in which the judgment sought to be annulled was rendered, and that the defendant must be cited as in ordinary suits. 3d. That the persons who are made defendants in this suit have never resided in the state; that they never were arrested, and no property of theirs has ever been attached. That, in his opinion, the only absentees to whom our courts can appoint a curator *ad hoc*, are those who have resided in the state and have departed without leaving any

one to represent them; and that those absentees who were never domiciliated in the state, and reside abroad, cannot be brought into our courts as defendants by curators *ad hoc*. 4th. That were it otherwise, the courts of the state of Louisiana would take jurisdiction of any case arising in any part of the world. 5th. And that, in his opinion, the only means of bringing, legally, the defendants in this case before our courts, would be to attack the judgment attached, as their property.

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It appears that De Forest Holly et al., who, it is contended, cannot, as absentees who never were domiciliated in the state, be brought before our courts, obtained in the course of last year, a judgment against the applicant for a certain sum of money. Eugene Ory, who, for certain reasons unnecessary to inquire into, is dissatisfied with the judgment, brings an action of nullity against his foreign judgment creditors, and seeks to set aside said judgment by them obtained by virtue and under the protection of our laws, but the difficulty, in the opinion of the parish judge, is to reach the defendants, and to carry on the action contradictorily with them.

We were inclined to believe that the decision of the case of *George vs. Fitzgerald*, reported in 12 *Louisiana Reports*, 604, settled the question in such a manner as to leave little doubt on the subject; but it appears that some of our learned brethren of the inferior tribunals, and members of the bar, entertain yet some very strong doubts whether our legislature has ever intended to extend the jurisdiction of our courts over persons who never were domiciliated in the state and who reside abroad, and whether such persons can be brought before our courts by the appointment of curators *ad hoc*. It will be conceded, as this court has said in the case of *George vs. Fitzgerald*; that previous to the promulgation of the Louisiana Code and Code of Practice, the appointment of a curator *ad hoc* to an absentee, was not authorized by law; and that the jurisprudence as fixed at that time, cannot have any weight on the present question.

But our present codes seem to have provided for all cases in which absent persons may be interested, or in which rights

Previous to the promulgation of the Louisiana Code and Code of Practice, the appointment of a curator *ad hoc*, to an absentee, was not authorized by law.

"The same course (that of appointing a curator *ad hoc*,) must be pursued, if the person intended to be sued be absent and not represented in the state." The question then presents itself, what is the meaning, under our laws, of the word "absent," and on referring to the article 3522 of the Civil Code, "*De verborum significatione*," we find, section 1, that "Absentee is the person who has resided in the state, and has departed without leaving any one to represent him. And section 2, it means also the person who never was domiciliated in the state, and resides abroad." This definition appears to be very broad, and the doctrine which we are about establishing under it, would undoubtedly be subject to be very much controverted and even criticised; for it seems at first blush very strange, and even absurd, that an individual should be said to be absent from a place where he never was present, and that the rest of the world should be considered by us as absentees from the state of Louisiana; but such was the will of the legislator, and our duty is to obey it, and to give effect to his laws as they were passed and promulgated.

In this particular case, it appears to us necessary that a curator *ad hoc*, should be appointed to the absentees, in order to represent them in the action of nullity; and we are glad to find that our laws have afforded means by which they can be reached. The judgment by them obtained against one of our citizens, would stand good and valid until it be annulled, and if an action of nullity is denied to the plaintiff, he might perhaps be unjustly made to pay a debt which he does not owe; and he would be without remedy under a system of laws made for his protection. If the absentees thought proper to apply to our laws for relief against one of our citizens, it is nothing but right that the same relief should be granted against them; and they cannot complain.

With regard to the suggestion made by the parish judge, to bring the defendants before his court, by attaching the judgment sought to be annulled: this course becomes now unnecessary; but it seems to us it would have been a dangerous course to be pursued, as it might perhaps be construed as an

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In an action of nullity, brought by the defendant therein, to annul a judgment obtained against him, as a citizen of this state, by *foreign creditors*, who never resided or owned any property in Louisiana, the suit will be sustained by the appointment of a curator *ad hoc* to the absentees.

EASTERN DIST. acknowledgment of the correctness and validity of the
March, 1840. judgment, and an acquiescence in its legal force and effect.

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Let the rule be made absolute.

KOHN ET AL. VS. LOUISIANA INSURANCE COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Suit was instituted for the whole amount due on a policy of insurance, which the defendants had settled and paid, but done with the view to try a feigned case, to see if they were not entitled to retain nine hundred dollars, for brick taken from the old buildings to re-construct the new houses : *Held*, that the court will not entertain or act on a feigned case or suit, even with the consent of parties.

This is an action on a policy of insurance to recover the sum of eighteen thousand dollars, for the loss of a block of brick buildings, insured for this sum by the defendants, and destroyed by fire.

The defendants admitted the insurance and loss, but averred they had tendered and paid the amount lawfully due and for which they were liable ; and further state, that they are entitled to recover nine hundred dollars for brick walls and brick used in rebuilding.

It appeared in evidence from a receipt on the back of the policy, that the plaintiffs had settled with the insurance office, and had received the amount now claimed in cash and notes. But it further appeared that the defendants claimed about nine hundred dollars, for remnants of brick walls and brick which the plaintiffs used in rebuilding their houses after being paid for the entire loss. The suit appeared to be a feigned one.

The plaintiffs had judgment, and the defendants appealed.

J. Slidell, for the plaintiffs.

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H. Strawbridge, for defendants.

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Martin, J., delivered the opinion of the court.

The plaintiffs claim the sum of eighteen thousand dollars, on a policy of insurance on a block of brick buildings insured for that sum and destroyed by fire.

The defendants admitted the insurance and destruction of the buildings; but aver that they have paid the whole amount insured, which is more than they were bound to pay, because the remaining walls were worth nine hundred dollars, and the plaintiffs' loss was diminished that amount. The plaintiffs had judgment, and the defendants appealed.

We find in the record the plaintiffs' receipt to the defendants in full for the loss sustained, which bears date before the institution of the present suit, which is evidently a feigned one. The object of the parties appears to be to ascertain whether the defendants were entitled to retain nine hundred dollars from the payment which they have made. This ought to have been done by a direct action of the insurance company, to recover back what they conceive ought not to have been paid. Courts sit to administer justice in actual cases, and not to act on feigned ones even with the consent of the parties, when they imagine that justice is to be more easily obtained by a simulated, than by a real case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the plaintiffs' suit be dismissed with costs in both courts.

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HART vs. THOMPSON'S EXECUTOR AND LEGATEES.

HART
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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF IBERVILLE.

Where it is shown that a testator is subject, from intemperance, to spells of insanity, which become general by long indulgence, but the witnesses to the will testify that he was sober and rational at the time of signing, he will be deemed competent to make a valid will.

Sealing and closing a mystic will with wafers, and making the witnesses sign across and between the wafers on the envelope, is a sufficient sealing and closing, within the meaning of the law, without the use or impress of a seal.

An attorney at law cannot be required to disclose communications of a deceased client, relative to dispositions in his will. There is no distinction between the case, where a party continues to be the client of the attorney, and when he is dead.

The plaintiff, Martha Hart, a widow, residing in Tennessee, alleges, she is the sister of Joseph Thompson, late of the parish of Iberville, who died without leaving any *legitimate* heirs, ascendants or descendants; and that she is his nearest collateral and sole legal heir. She alleges, that the will of her deceased brother, which has been admitted to probate, is null and void on several grounds.

1. That the testator was not of sound mind at the time of making the will, and had been insane for several years before signing it.

2. The will was not closed and *sealed*, as required by law, being only sealed with common wafers, without any impress of a seal or stamp.

3. That the legal formalities prescribed for mystic wills in articles 1577 and 1578, have not been complied with, and that the will was not presented sealed and closed to the notary and seven witnesses, by the testator, nor did he declare to the notary, in the hearing of the witnesses, that the package or envelope contained his last will and testament.

4. That the testator did not sign the *procès verbal* or superscription in the presence of seven witnesses, and that it was not read to the testator and witnesses.

5. The formalities prescribed in the 1577th article of the EASTERN DIST. code were not done and performed at one time, without March, 1840. interruption, and turning aside to other matters.

6. That one of the witnesses was incompetent, being deaf.

The petitioner further alleges, that even if the will be sustained, some of the legacies are illegal and reducible. That there are disguised donations and illegal dispositions, by means of persons interposed; and especially, the universal legacy in favor of Charles H. Dickinson, is void; being a *fidei commissa*, to be by him preserved and kept as a bequest or donation to Joseph Thompson, a natural and illegitimate child of the deceased.

Various other grounds of illegality are set up against the will, and the dispositions made in it.

The petitioner prays that this will be annulled, and that she be declared the lawful heir of her deceased brother; or if it be sustained, that the dispositions therein be reduced to the disposable portion in her favor.

The executor and others, representing the legatees pleaded a general denial.

There was much testimony taken relative to the state of mind and condition of the testator, at and for some time before making his will. It was shown that he was a man of intemperate habits for several years before his death, and whilst intoxicated appeared insane; but the witnesses to the will stated, that he was cool, and appeared perfectly sane, at the time of making the will. One witness called, but who had not attested the will, declared he knew the testator for ten or fifteen years before his death, and that he was an industrious man, and prudent in his transactions. Knew him to drink at times. He had spells of intemperance and spells of sobriety. Whenever he was in a drinking spell he was crazy and foolish, but when sober, would regret his conduct whilst drinking. Saw him on the day he presented his mystic will to the parish judge, and found him of sound mind, and capable of transacting any kind of business.

On hearing the testimony, the judge of probates overruled

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EASTERN DIST. all the objections to the will, and gave judgment against the plaintiff, and she appealed.
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Labauve and Edwards, for the plaintiff.

Winchester and Ives, contra.

Morphy, J., delivered the opinion of the court.

The plaintiff, alleging herself to be the legitimate sister of Joseph Thompson, deceased, seeks to annul and set aside the last will of the latter, and, in case the will is not avoided *in toto*, to have certain legacies therein contained, annulled. Of all the grounds assumed by counsel, it is thought necessary to notice only the following :

1. The insanity of the testator.
2. The failure to comply with article 1577 of the Louisiana Code, in properly closing and sealing the will.
3. The fact that the universal legacy to C. H. Dickinson contains a *fidei commissum*, by which said apparent legatee undertook to keep the property for, and return it to Joseph Thompson, the natural child of the testator.

Where it is shown that a testator is subject, from intemperance, to spells of insanity, which become general by long indulgence, but the witnesses to the will testify that he was sober and rational at the time of signing, he will be deemed competent to make a valid will.

tion ; but that afterwards, his mind resumed its strength and business habits fully ; that when sober, his mind, knowledge and attainments were above mediocrity ; that he never considered Thompson's a case of insanity. By other witnesses, he was not thought to be generally of sound mind. He is represented by the witnesses who signed with him the act of superscription of his will, to have been, on that occasion, perfectly sober, self-possessed and rational. The parish judge had seen Thompson, and conversed with him several times within the last month previous to the making of his will, and found him of perfectly sound mind before and at

that time ; but he adds, that some months before, Thompson had been quite deranged from the effects of hard drinking. The impression made on our minds by the whole testimony adduced on this head is, that even admitting the general insanity of the deceased, which is by no means satisfactorily proved, there is abundant evidence that he was *compos mentis* and fully competent to make a will at the time he appeared before the parish judge for that purpose.

II. It is said that the will is null, because it has not been closed and sealed according to law ; no stamp or impress having been used by the testator. To show this, the original paper which enclosed the will has been sent up with the record. It appears to have been closed and sealed with three wafers, but no trace appears of the impression of any stamp. We are told that these expressions *clos et scellé*, used in the French text of article 1577 of the Louisiana Code, of which the English is a translation, are borrowed from the Napoleon Code, and that to ascertain their meaning we must look to the commentators on that code, and the decisions made under it in France. We find some contrariety of opinion among the French jurists as to their true meaning. The weight of authority appears decidedly in favor of a rigid and literal construction, requiring a stamp or impress to be used in the sealing of mystic wills, and pronouncing their nullity when they are closed only with wax or wafers, without any seal. Others have thought that article 976, of the Napoleon Code, did not contemplate absolutely, and under pain of nullity, that any seal or stamp should be used. Malleville, in commenting upon it, says : “ *Suit-il de ces termes que sur la feuille contenant le testament ou sur le papier qui lui servira d'enveloppe, le testateur soit obligé, à peine de nullité, d'imprimer un cachet ordinaire ? Je ne le crois pas. Il y a tant de testateurs, surtout dans les campagnes qui n'ont pas de cachet ou de sceau. La loi a seulement entendu dire que le testament fût clos et fermé de manière à ce qu'on ne pût pas l'ouvrir sans déchirer le papier et sans laisser vestige de la rupture.*” *Analyse raisonnée du Code Civil*, 2e. Vol., page 390. *Vazeille, Résumé des Conférences*, 2e. Vol. p. 476.

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We are inclined to adopt the latter opinion. Although not so strongly supported, or so generally received as the other is in France, it comports better with the manners and habits of this country, where the use of seals is rather uncommon, and where we understand the law to have already received this construction in practice. The Louisiana Code, article 1577, does not prescribe how and in what way mystic wills are to be sealed, nor does article 1644, which treats of the probate of such instruments, say a word about the necessity of a seal appearing to have been affixed. It requires only proof of the signatures of the witnesses to the act of superscription, and their declaration that they recognize the sealed packet presented to them as the same one handed to the notary by the testator as containing his last will. Usage, no doubt, went a great way in France in determining the meaning of the words used in article 976, of the Napoleon Code. The provision itself was taken from the ordinance of 1735, which prescribed that mystic wills should be closed and sealed "*avec les précautions en tel cas requises et accoutumés.*" In that country, the use of seals was formerly as general as it is unusual in ours. The danger of the will being changed or altered, is given by the writers as the reason why the impression of a stamp is required. It is said to be a necessary precaution against the fraudulent opening of the envelope. This reason is far from being conclusive. The law has not determined what that seal or impress should be. It has not provided that the seal used shall be described *ne varietur* in the act of superscription. If, then, no particular seal is mentioned in that act, what protection or security does a seal afford, which can be broken open and replaced by any other seal. This omission of the lawgiver, to explain what was the sealing in his contemplation, authorizes us, we apprehend, to take the word in its ordinary acceptance, and as understood by the community generally. Louisiana Code, article 14. Webster's Dictionary informs us that fastening with wafers is sealing, and common usage, not only in Louisiana, but throughout the United States, sanctions that use of the word. It is only necessary, then,

to examine whether the packet has been carefully closed and sealed, and whether it has, in reality, remained untouched. These circumstances are generally attested by the judge of probates in drawing up his *procès verbal* of proofs. In the present case, a precaution has been taken by the notary, which seems to us to afford more security than any seal or stamp that could have been used. It was making the witnesses sign across and between the wafers, sealing the envelope of the will so that it could not possibly be opened without tearing or defacing their names. This, we think, was a sufficient *closing* and *sealing*, within the meaning of our code.

III. The charge that the legacy to Dickinson was a *fidei commissum* is unsupported by the evidence. Our attention has been drawn to a bill of exceptions to the opinion of the judge below, sustaining an objection to the testimony of one G. Taylor, who had been the counsel of the deceased. He was called upon to disclose certain confidential communications supposed to have been made to him by his late client in relation to his last will. The judge, we think, decided correctly. We cannot admit the distinction pressed upon us by appellant's counsel between the case where a party continues to be the client of the attorney, and that when he has ceased to be his client, at the time the attorney is called upon to testify. We do not think it necessary neither, to exclude such testimony, that the client should be a party to the suit in which it is offered; nor do we understand why the courts should feel themselves authorized to supply the consent of a client who has died without giving it. *Louisiana Code, article 2262.*

It is therefore ordered that the judgment below be affirmed with costs.

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Sealing and closing a mystic will with wafers, and making the witnesses sign across and between the wafers on the envelope, is a sufficient *sealing* and *closing* within the meaning of the law, *without the use or impress of a seal.*

An attorney at law cannot be required to disclose communications of a deceased client, relative to dispositions in his will. There is no distinction between the case where a party continues to be the client of the attorney, and when he is dead.

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BISSELL ET UX. VS. ERWIN'S HEIRS.

BISSELL ET UX.
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IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

When the vendee has been evicted by an outstanding mortgage, and claims damages from his vendor, parole evidence is admissible to show the real amount of damages actually sustained; notwithstanding the vendee may have been in arrears of interest or rent at the time of eviction.

The writ of seizure or execution, and the officer's return thereon, may be given in evidence, without the judgment, when that appears in the record, although introduced for another purpose.

The rejection of irrelevant evidence, which, if admitted, could not have influenced the decision in the case, cannot be complained of.

Where the vendee sues for damages, on account of eviction, evidence to show a putting in *default* by the vendor, in demanding rent or interest due, is not admissible. It can have no influence on the claim for damages after eviction.

Evidence of the acts or acknowledgments of a *nominal* party to a suit, touching a modification or new promises in relation to the original contract or transaction in question, will not be admitted.

When the eviction is admitted by the pleadings, the production in evidence of the writ or execution under which the sheriff acted, is sufficient, without the judgment under which it issued.

The *increased* value of the property forms a part of the damages assessed on the warranty in case of eviction; but such *increase only* as the parties could have had in contemplation at the time of the contract, will be taken into the account.

This is an action to recover damages on the warranty against the heirs of the vendor, by those of the vendee, on account of eviction.

The plaintiffs show, that in 1827, Abram Wright bought of Joseph Erwin a tract of land and slaves for the price and sum of eleven thousand dollars, payable in fifteen years; and in the mean time was to pay an annual rent of eleven hundred dollars per annum until final payment. At the time of this sale the Bank of the United States held a mort-

gage on said property, to secure the payment of twenty-one thousand dollars, due it by Joseph Erwin, and which was not disclosed by him at the said sale, to the vendee, Abram Wright. The petitioners also allege, that before the death of Erwin, in 1829, Wright made complete payment of the price, to wit, the sum of eleven thousand dollars. In the same year Wright died, and left a widow and one child. The widow afterwards married Frederick N. Bissell, who joins her in this suit. That in 1833, the Marshal of the United States for the Eastern District of Louisiana, levied an execution on said plantation and slaves, which issued on a judgment in favor of the Bank of the United States against the widow and heirs of Joseph Erwin, for the balance of the said mortgage debt still due and unpaid, amounting to ten thousand five hundred dollars, with interest; and the same was sold, to sundry purchasers, by which the widow and heir of Wright were evicted.

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The plaintiffs, Bissell and wife, in her own right, and as tutrix and co-tutor of the sole minor child and heir of Wright, instituted this suit the 4th April, 1834, to recover damages in consequence of the eviction. They allege, that the property was worth twenty-seven thousand dollars at the time of said eviction, which, with the loss, revenues, &c., makes their claim for damages thirty-five thousand six hundred and thirty dollars. They further state, that if they fail to show full payment of the original price by Wright in 1829, that they were not bound to pay the same until the end of fifteen years from the date of the sale in 1827, by paying eleven hundred dollars per annum rent, or interest.

They pray judgment for the *increased* value of the property at the time of eviction, being sixteen thousand dollars over and above the original price, and for other damages which they have suffered in consequence of the said eviction.

The defendants plead sundry objections, and also denied the heirship of the plaintiffs, and likewise denied they themselves were the heirs, pure and simple, of Joseph Erwin, but that his estate was accepted with the benefit of inventory. They admit the sale of 1827, but deny that any of its terms

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or stipulations have ever been complied with, either by Wright in his lifetime, or by other persons since or before his death, so as to entitle his heirs or any other person to the benefits and advantages of the said agreement or lease; that the rent was never paid; nor the purchase money or any part thereof; that at the time of making this agreement, Wright was well aware of the incumbrance or mortgage existing on the property, and especially the mortgage to the Bank of the United States. That subsequently, to wit, on the 25th November, 1828, another agreement was entered into between Erwin and Wright, in which the latter acknowledged and declared he had on that day rented the premises, he then living on them, together with all the slaves and farming utensils, for which he was to pay the next or ensuing year eighteen hundred and forty-seven dollars. That this last agreement, which gave to Erwin certain privileges on the crop, operated the annulment and discontinuance of the first. The defendants pray that the plaintiffs' demand be rejected.

Upon these issues and pleadings this cause has been several times tried, and was formerly twice before this court. See 10 *Louisiana Reports*, 524; 13 *Idem.*, 143.

In the course of the trial several bills of exception were taken by the defendants to the opinion of the court on questions or points arising on the introduction of evidence, and the charge of the judge to the jury. These several points are taken and fully stated in the opinion of this court, which need not be recapitulated.

There was a verdict and judgment for the plaintiffs, giving them four thousand dollars; and after an unsuccessful attempt to obtain a new trial the defendants appealed.

Labauve and *Ives*, for the plaintiffs and appellees, prayed the affirmance of the judgment.

Winchester and *Edwards*, for the defendants and appellants, endeavored to show that neither Wright nor the plaintiffs had such a contract of sale, or had done any thing to entitle

them to the privileges and rights of vendees evicted, on the warranty against the defendants as vendors. That there was error in the decision of the court, excluding evidence, which went to show the true and proper relations between the parties, and that Wright was nothing more than a lessee, and had even failed to comply with his engagements as such.

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Bullard, J., delivered the opinion of the court.

This case has been repeatedly before this court, and was finally remanded for a new trial last year. (See 13 *Louisiana Reports*.) And from a judgment founded upon the verdict of a jury, rendered on the last trial, the defendants prosecute the present appeal.

Several bills of exceptions, which we proceed to notice, cover the whole merits of the controversy between the parties.

The first shows, that the plaintiffs offered parole evidence to prove that they had suffered damages by eviction from the plantation and slaves, set forth in their petition, under an order of seizure and sale in a suit of the United States Bank vs. The Widow and Heirs of Erwin, to the introduction of which evidence the defendants objected, on the ground that the plaintiffs could not go into proof of any damages for eviction until they had first proved that A. Wright had paid up the rent, as stipulated in the acts of sale from Erwin to Wright. The payment of the rent being a condition precedent by said acts of sale, and until this was done the defendants were not put *in morâ*, and therefore not liable in damages; the payment of the rent being the condition upon which Wright was to be maintained in possession. The objections were overruled, the evidence admitted, and the defendants took their bill of exceptions.

The court, in our opinion, did not err. The eviction did not take place in consequence of a failure to pay the rent or interest, but in consequence of an outstanding mortgage in favor of the bank. The non-payment of a stipulated interest, under the name of rent, which, in truth, was a part of the price, may, indeed, have weight in deciding upon the quan-

When the vendor has been evicted by an outstanding mortgage, and claims damages from his vendor, parole evidence is admissible, to show the real amount of damages actually sustained, notwithstanding the vendee may have been in arrears of interest or rent at the time of eviction.

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The writ of seizure or execution, and the officer's return thereon, may be given in evidence, without the judgment, when that appears in the record, although introduced for another purpose.

The rejection of irrelevant evidence, which, if admitted, could not have influenced the decision in the case, cannot be complained of.

tum of damages, but cannot prevent the party evicted from offering evidence to show the amount of damages really sustained.

The second bill of exceptions shows, that the plaintiff offered in evidence the petition and proceedings, with the writ of seizure and sale issued by the clerk of the United States Court, together with the Marshal's return thereon, in the case of the Bank of the United States against the widow and heirs of Erwin. Their introduction was opposed on the ground that a judgment, or order of seizure, should first have been shown, under which the Marshal proceeded. But the court overruled the objection, and permitted the documents to be read to the jury, being of opinion, that the first was already admitted by the pleadings. This view of the court is fully sustained by an inspection of the record, from which it appears that the seizure and sale, by judicial authority, is not only admitted, but is pleaded as a defence against this action, on the allegation that it was by the fault of the plaintiffs.

The defendants next offered in evidence the *proces verbaux* of two meetings of the family of the minor plaintiff, held with a view of advising a compromise or transaction with the heirs of Erwin, and of obtaining a loan upon the property in order to pay off the mortgage to the bank. These documents were offered to show that the plaintiffs had assumed to pay the bank mortgage under which they complain of having been evicted. This evidence was rejected, the court being of opinion, that as the plaintiffs hold under an act under private signature, and the mortgage to the bank being by authentic act, and consequently binding on the property, it was the interest of the plaintiffs to pay the debt, although not their own, and that the effort to effect a compromise was with the same view and motive, and that a tender of a compromise ought not to militate against a party wishing to buy his peace. That no compromise, in fact, was shown, &c. We think the court did not err. The evidence was irrelevant, and, if admitted, could not in our opinion have influenced the decision of the case.

OF THE STATE OF LOUISIANA.

The defendants further took a bill of exceptions to the refusal of the court to admit evidence of a demand of A. Wright by the executor of the last will of J. Erwin, to pay the rent due on the property, and thus putting him *in mora*. We concur with the district judge in the opinion that such putting in delay would only have authorized the heirs of Erwin to proceed against Wright, according to the conditions of their contract, but could have no influence upon the decision of this case, for reasons already alluded to.

The defendants next offered to prove by witnesses, that one of the plaintiffs, to wit, F. N. Bissell, the husband of the late widow Wright, had often declared, that the plaintiffs had entered into an agreement with the defendants to pay the mortgage debt due to the United States Bank, and that Erwin's heirs had released them from a larger debt due; that they had made a good arrangement, and were then negotiating with the bank to extend the time of payment. But the evidence was, in our opinion, properly rejected, because Bissell being only a nominal party could not alone bind the plaintiffs by his acts or his acknowledgments.

The defendants prayed the charge of the court to the jury upon various questions of law, arising in the progress of the trial, and we proceed to review the charge given, so far as the instructions asked were refused by the court. Upon the first instruction asked, we have already expressed our opinion, to wit, that the fact of eviction is admitted by the pleadings, and that the production of the writ under which the sheriff acted was sufficient, without showing the fiat of the judge.

The judge was required to charge the jury, that the value of the property at the time of the eviction, is not the true and proper estimate of damages which the plaintiffs should recover. That they have only a right to recover back the purchase money, and such damages as they may have suffered; and that these damages should be confined to the price paid, and the value of the improvements, and the injury they may have sustained by the inconvenience of change of domicil and loss of time. This charge the court properly refused to give, but instructed the jury in the language of

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Where the vendor sues for damages, on account of eviction, evidence to show a putting in default by the vendor, in demanding rent or interest due, is not admissible. It can have no influence on the claim for damages after eviction.

Evidence of the acts or acknowledgments of a nominal party to a suit, touching a modification or new promises in relation to the original contract or transaction in question, will not be admitted.

When the eviction is admitted by the pleadings, the production in evidence of the writ or execution under which the sheriff acted is sufficient, without the judgment under which it issued.

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The increased value of the property forms a part of the damages assessed on the warranty in case of eviction; but such increase only as the parties could have had in contemplation at the time of the contract will be taken into the account.

the Supreme Court in this cause : That the law stands here as it did in France before the adoption of the code, and there the increased value of the property formed part of the damages assessed on a warranty, but such increase only as the parties could have had in contemplation at the time of the contract, ought to be taken into the account, and the vendor should not be made to pay the increase which results from unforeseen events, or from accidental causes. The judge referred the jury to the opinion of this court, *in extenso*, as reported in 13 *Louisiana Reports*, 143. It is, perhaps, useless to say that the opinion of this court remains unchanged on this point.

Upon the 4th, 5th and 6th points the charge conformed to the request of the defendants.

7th. The court was next asked to charge the jury, that the sale of the 13th of May, 1827, superceded and annulled the act of June, 1824, and that this latter sale ought not to be taken into consideration in estimating the damages. The judge, on the contrary, told them, in the language of this court, that the act of sale of 1824, together with that of 1827, and Wright's memorandum of 1828, appear to us to be evidence of one and the same contract, modified in its execution by each of those acts, but from the beginning, a sale to Wright of the property from which the plaintiffs have been evicted.

On the 8th and 9th points, the charge conformed to the prayer of the defendants.

The whole may be considered as a fair exposition of the law of the case, and on some points, perhaps, more favorable to the defendants than they had a right to expect. The case was fairly tried, and although the evidence is variant, yet we are not authorized to pronounce the verdict so manifestly wrong as to disregard it.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DASHIELL vs. LESASSIER.

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IBERVILLE, THE JUDGE OF THE SECOND DISTRICT PRESIDING.DASHIELL
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LESASSIER.

The act of 1831, section 3, allowing interest and damages on the dissolution of an injunction, does not apply to an opposition and injunction to stay an order of seizure and sale.

The plaintiff in an opposition and injunction against an order of seizure and sale, may *discontinue* his suit, without being required to pay either special or other damages, as it is only incidental to the hypothecary action; and he gives no security bond.

In this case Luke Lesassier obtained an order of seizure and sale against property in the possession of A. Dashiell, who had purchased it from T. Lesassier, the tutor of Luke, who claimed to have a mortgage resulting from the tutorship.

Dashiell, the third possessor, made opposition, and obtained an injunction against the order of seizure, and after Lesassier had joined issue, moved the court to dismiss his injunction, as in case of non-suit, which was opposed by the defendant's counsel, on the ground that he had filed his answer, and set up a reconventional demand. The defendant also prayed for damages under the act of 1831, relating to interest and damages on the dissolution of injunctions.

The district judge was of opinion the act of 1831 did not apply to cases like this; that no security or bond was given, and that no damages, either general or special, could be allowed. The plaintiff was permitted to discontinue his opposition and injunction, without being required to pay damages. The defendant appealed.

Winchester and Ives, for the plaintiff.

Labauve, contra.

Simon, J., delivered the opinion of the court.

On the 15th of April, 1839, the defendant obtained an order of seizure and sale against the plaintiff as third posses-

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of certain real property and slaves, formerly owned by T. Lesassier, his tutor, and subject to his legal and tacit mortgage. The rights of the defendant, as a minor, having been liquidated, he recovered, on account thereof, out of the sale of the principal debtor's property, a sum of three thousand five hundred and one dollars, leaving due a balance of fourteen thousand one hundred and fifty-one dollars, with interest. The plaintiff in this suit, on the 30th of April, 1839, made opposition to the issuing of said order of seizure and sale, under articles 739 and 740, of the Code of Practice, on the ground that the alleged mortgage had been extinguished by transaction and novation, and obtained an injunction to stay the proceedings. The district judge, in granting the order of injunction, dispensed the plaintiff with giving the bond and security required in ordinary cases of injunction. Defendant joined issue on the allegations contained in the third possessor's petition, and prayed that the injunction be dissolved, and that interest and damages be allowed him according to the 3d section of the act of 1831.

On the same day that the answer was filed, (1st of May, 1839,) the plaintiff moved the court for leave to dismiss the injunction, as in case of non-suit, and defendant contended that this could not be done, as he had previously filed his answer with a reconventional demand, and that he was entitled to a trial. The injunction had its effect only for one day.

The district judge was of opinion that the injunction should be dismissed, and refused to allow the defendant the interest and damages by him prayed for, from which decision the defendant appealed.

The act of 1831, sec. 3, allowing interest and damages, on the dissolution of an injunction, does not apply to an opposition and injunction to stay an order of seizure and sale.

We think the district judge did not err. The act of 1831, section 3, in our opinion, provides for a certain class of cases entirely distinct from the case now before this court; those cases are enumerated in the articles of the Code of Practice relative to injunctions; and in order to obtain an injunction on the grounds therein set forth, it is necessary to give a bond and security in favor of the defendant. But it is not so under the articles 739 and 740. No bond is to be required,

and the merits of the opposition are to be tried summarily. To say that interest and damages are to be allowed without proof, and as a matter of course in all cases of injunction, would, it seems to us, be going beyond the intention of the law maker, as he certainly had in contemplation cases of injunction only, in which a bond and satisfactory security are required. We think that the provisions of the law of 1831, are not applicable to this case, and that it would be mulcting the plaintiff in a heavy penalty without any law to authorize it.

We have been referred to the cases of *Landry vs. l'Eglise*, 3 *Louisiana Reports*, 219, and *Catlett vs. M'Donald*, 13 *Louisiana Reports*, 44, as being cases in point, and in which this court allowed interest and damages; but from an attentive perusal of those cases, and of the statement of the facts given by the reporter, it does not appear that the plaintiff in injunction had given no bond, and if none was given, that the question was raised.

For the same reasons we do not think that defendant can be allowed any special damages for the fee which he says he is to pay to his counsel for defending this suit; and as the present suit is only incidental to the principal hypothecary action, we are unable to perceive any reason why it should occasion him any additional expense.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, and that the defendant and appellant pay the costs of appeal, those of the District Court to be borne by the plaintiff.

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DASHIELL
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LEMASSIER.

The plaintiff, in an opposition and injunction against an order of seizure and sale, may *discontinue* his suit, without being required to pay either special or other damages, as it is only incidental to the hypothecary action; and he gives no security bond.

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WINCHESTER vs. ORY'S SYNDICS.

WINCHESTER

vs.

ORY'S SYNDICS.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH
OF ST. JAMES, THE JUDGE THEREOF PRESIDING.

Where one of the appellants dies after the appeal is taken, and the other fails to file the record on the return day, or within the legal delay, and in the meantime the appellee obtains the clerk's certificate, the court forbears to dismiss the appeal, under the act of the 20th March, 1839, or to impute the fault to the appellant.

This is an action against the syndics of the creditors of J. B. Ory, in which the plaintiff, as the assignee of M. Bergeron, and holder of six notes of the insolvent, claims from the defendants the amount of certain dividends arising from the property sold.

The defendants resisted the plaintiff's demand, and averred, that the notes held by the plaintiff had been pledged by notarial act to one Maurice Prevost, by M. Bergeron, who ceded them to the widow Balloc, and who had received the dividends due to the holder of the notes as she had a right to do in virtue of said pledge.

Upon these issues the case was tried. It was shown by the evidence, that Bergeron had transferred and *delivered* the notes in question to Winchester; although he had also pledged them by notarial act, in due form of law, to Maurice Prevost. The plaintiff is the transferee by actual delivery; and the syndics paid the dividends to the transferee of a pledgee *without* delivery.

The court decreed the amount of the dividends to be paid to the plaintiff, and the syndics appealed.

The appeal was made returnable to the first Monday in January, 1840; and one of the syndics died in December, previously to the return day. The record was not filed in this court until the 27th January. In the meantime, the plaintiff and appellee obtained a certificate from the clerk, that the record was not filed on the return day, nor within the legal delay thereafter.

Beatty, for the plaintiff and appellee, moved to dismiss the appeal, because the record was not filed in time.

Deblieux, contra, opposed the motion, and showed the death of one of the appellants.

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Martin, J., delivered the opinion of the court.

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VS.
ONT'S SINDICS.

The appellee prays for the dismissal of the appeal on the following grounds :

1. Because the record was not filed on the return day thereof.
2. The appellee has obtained the clerk's certificate, that the record was not filed within the legal delay after the return day.

The appeal was made returnable to the first Monday in January, and the record was not filed until the 27th day of that month. In the meanwhile the appellee had obtained the certificate of the clerk of this court.

The attorney of the appellants has shown that one of them, *Andry*, died since the appeal was obtained; and his survivor being unable to stand in court alone, the case ought to be continued until a new syndic be appointed, as the creditors have not authorized one of them to act alone.

The motion to dismiss was made on the 3d March. This case is clearly within the provisions of the act approved 20th March, 1839, section 19.

The appellee having taken the certificate, must be presumed to have proceeded to the execution of his judgment notwithstanding the appeal. This circumstance is, in some degree favorable to the appellants, as it renders the appeal less onerous to the appellee. But we are, by the late law, directed to forbear to dismiss the appeal, when the delay in bringing up the record is not to be imputed to the appellant.

We are of opinion, that the death of one of the syndics, presents at least an excuse to the survivor, who may have believed that the deceased one, had given directions to bring up and file the appeal in proper time; especially as the delay does not appear to have occasioned any real injury to the appellee.

Where one of the appellants dies after the appeal is taken, and the other does not file the record on the return day, or within the legal delay, and in the meantime the appellee obtains the clerk's certificate, the court will forbear to dismiss the appeal, under the act of the 20th March, 1839, or to impute the fault to the appellant.

The motion to dismiss is, therefore, overruled.

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VERRET ET AL. VS. THERIOT.

VERRET ET AL.

VS.

THERIOT.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF
LAFOURCHE INTERIOR, THE JUDGE THEREOF PRESIDING.

Where a party holds and possesses property honestly, and by virtue of a contract of sale, regular in matters of form, without notice of the plaintiff's claim, and having retained possession publicly without interruption, and in good faith, for more than *ten years*, he acquires a title by prescription.

ON A REHEARING.

The Civil Code of 1808 is a digest of the civil laws which were in force in Louisiana; and the re-enactment of them did not repeal the exceptions which limited their operation under the Spanish jurisprudence.

The provision in article 227, page 258 of the old Civil Code, that the surviving husband or wife, who marries again, is forbidden to dispose of the property inherited from any of the deceased children of the first marriage, it being reserved for the children of that marriage, is taken from the 15th law of Toro.

The Spanish laws make an exception, that the surviving spouse, on marrying again, *is not bound to reserve* the property of his deceased child of the first marriage for the other children of that marriage, when it has been *acquired otherwise* than by inheritance from the deceased parent. It becomes the absolute property of the survivor, if it has been purchased by the deceased child, from the moment of his death.

This is an action of revendication. The plaintiffs Edward, Furcy and Louise Verret, children of Jacques Verret, now deceased, allege that their brother Solomon Verret, died intestate, in 1818, without descendants, and no ascendants but his father, possessed of a large property, of whom they became legal heirs; their common father having contracted a second marriage, in consequence of which he could only claim the usufruct of his deceased son's property.

They further allege, that in 1820, their father sold a tract of land on the Bayou Lafourche, belonging to their deceased brother's succession, to the defendant, which is well worth twenty thousand dollars; that Solomon Verret, a few months before his death, in 1818, purchased the tract of land in

question from one Pierre Daspit. The plaintiffs further allege, that they are entitled to recover said tract of land, as the legal heirs of their deceased brother; and also the rents and profits, worth one thousand dollars per annum, from the death of their father, Jacques Verret, in 1829. They pray judgment accordingly.

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The defendant pleaded a general denial; and also the prescription of ten years possession, under a good and just title, and in good faith. He then sets out his title, and calls his vendors in warranty.

Upon these pleadings and issues the cause was tried.

Each party exhibited complete evidence of his claim and title. The facts were few and not disputed. The whole case turns on the legal right of the plaintiffs' father to sell the land in question, and of the defendant's right under the sale and prescription.

The cause was submitted to a jury, under an elaborate charge from the district judge presiding, who returned a verdict for the defendant. From judgment, confirming this verdict, the plaintiffs appealed.

Beatty and M^cAllister, for the plaintiffs and appellants.

The title of the plaintiffs to the land in dispute, cannot be questioned, unless they have forfeited their rights by some act of theirs, or unless the defendant has acquired title by prescription. See *Old Code*, article 227, page 258; *Louisiana Code*, article 1746; 6 *Martin*, N. S., 31; 7 *Idem.*, 665.

2. The right of the plaintiffs, was, however, one which was subject to the condition of their surviving their father, and forms a kind of legal substitution; (the only one known to our law.) 7 *Martin*, N. S., 668 and 669; *Pothier Traité de Donation inter vivos*, vol. 5, p. 59, and section 3d, article 8, paragraph 2d, where he considers the rights of children; and the 2d head of the edict of 2d, Marriages, as a substitution by law. *Pothier Traité des Substitutions*, article 1st of section 3d, pages 80 and 81, vol. 5; *du même Traité et vol. Article 3d*, declares an order not to sell when made in favor of another, a substitution, and the codes and articles quoted above, for the order not to sell.

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3. The plaintiffs having only an eventual right to the property, that is being substituted by law to their father as relates to the particular property, prescription could only begin to run from the opening of the substitution, or the happening of the event on which their rights depended, to wit: the death of their father, Jacques Verret, 3 *Martin*, 460; 24 *Merlin's Repertoire verbo Prescription; Questions du Droit*, 12 and 13, pages 177 and 179; *Pothier Traité des Donat.*, section 3d, paragraph 5th, page 37; *idem.*, *Traité des Substitutions*, vol. 5, section 5, article 3, page 105; *Merlin's Repertoire, &c.*, verbo *Substitutions Fidei commissaire*; *Old Code*, article 61, page 486; *Troplong on Prescription*, article 787 and 788.

4. The title of defendant is not such an one as is required for the prescription of ten and twenty years. The property in dispute "is one of those things which are prohibited by law from being sold in consequence of the privilege of those who are the proprietors of it." *Old Code*, article 227, p. 258; *Louisiana Code*, 1746; *French text of article 3463*, in comparison with 4th clause of article 3445.

5. Legal good faith was wanting. The law requires every one to know the capacity of him with whom he treats, and so does it require him to know that the thing for which he treats, is one of those whose sale is not prohibited by the law, or is not in commerce. *Troplong on Prescription*, articles 917, 918 and 795. In this last, he declares a thing not in commerce which the law orders not to be alienated, as property subject to a substitution. *Troplong on Sales*, articles 209, 210, 211, 212, 213 and 222; *Louisiana Code*, 2423 and 3420; *Pothier Traité de Prescription*, ch. 1st, article 1.

Miles Taylor, for the defendant.

Eustis, J.,* delivered the opinion of the court.

Some time in the year 1818, Solomon Verret, then living in the parish of Lafourche Interior, died intestate, leaving his

* This opinion was delivered at March term, 1839, but suspended on a rehearing.

father, Jacques Verret, and his brothers and sister; the three latter plaintiffs in this suit.

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His father took possession of the estate of the deceased, as the heir of his son, on the 27th of January, 1820, and sold to the defendant a tract of land belonging to the estate, by an act of sale, legal in point of form.

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Jacques Verret, previous to the death of his son, had contracted a second marriage. Solomon Verret left no descendants.

The plaintiffs have instituted this suit for the recovery of the land sold to the defendant, alleging themselves to have had the sole right to the property of their deceased brother at the time of his death, on account of the second marriage of their father, who, they allege, merely retained the usufruct of it during his life.

The defendant pleaded the prescription of ten years resulting from possession of the land, in good faith, under a just title.

It has been contended at bar, that on the death of the brother, Solomon Verret, the property was held as a substitution, and that the defendant's prescription could only commence from the date of the father's death, which took place in 1833.

We are of opinion that, under the 227th article of the Code of 1808, page 258, the estate of the deceased passed to his brothers and sister, the plaintiffs. The father would have had the usufruct had his children been minors, and not married. See *Matienzo, Commentaria, lib. 5, tit. 1, 1-9, gloss. 1. Nos. 1 and 2; Novissima Recopilacion, lib. 10, tit. 5, law 3; Gomez ad legis tori, law 48: Voet ad Pandectus, lib. 23, tit. 2, §103.*

The usufruct given by the Spanish laws to the father of the adventitious property of the son, resulted from the paternal power under that system. *Institutes of the civil law of Spain, book 1, tit. 8; Partida 4, tit 17, l. 5.*

By the code of 1808, the paternal power was much modified, and the usufruct of the father resulting from it was limited to the minority of the son. See *Code, article 37, et*

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Where a party holds and possesses property honestly and by virtue of a contract of sale, regular in matters of form, without notice of the plaintiff's claim, and having retained possession publicly, without interruption, and in good faith, for more than ten years, he acquires a title by prescription.

seq., page 52. The good faith of the defendant is questioned by the plaintiffs, and they refer to the act under which he purchased, as proving that he had knowledge that Jacques Verret acquired the land by the succession of his son. We do not think this circumstance sufficient to establish his want of good faith. The father might have acquired it lawfully by testament, and there is nothing in the evidence which proves that the defendant was apprised of the want of title on the part of the vendor; on the contrary, we think that he became possessed of the property fairly and honestly, and by virtue of a contract of sale, regular in matters of form, without notice of the plaintiff's claims, and having retained possession of the same publicly, without interruption and in good faith, for more than ten years, that he has acquired against the plaintiffs a title to it by prescription.

The judgment of the court below is, therefore, affirmed with costs.

VERRET AND OTHERS vs. A. BOURGEOIS.

APPEAL FROM THE SAME COURT.

By agreement of counsel the same judgment must be rendered as in the case of Verret and others vs. Theriot.

The judgment of the court below is, therefore, affirmed with costs.

A rehearing was granted at the instance and on the prayer of the plaintiffs.

At this term it was argued by Messrs. *Beatty, Roselius* and *C. Janin*, for the appellants.

Miles Taylor, for the defendant, appellee.

Morphy, J., delivered the opinion of the court.

This case was determined in last March term, and now comes before us upon a rehearing. The facts on which it

turns are few and undisputed. Some time in 1818, Solomon Verret died intestate, in the parish of Lafourche Interior without descendants, but leaving his father, two brothers and a sister. The three latter are plaintiffs in this suit.

Jacques Verret, as sole heir of his deceased son, under the old Civil Code, took possession of the property left by him, and on the 27th of January, 1820, sold to the defendant a tract of land which was part of the estate.

Long previous to the death of his son, Verret, had contracted a second marriage.

This suit is brought by the plaintiffs to recover the land thus sold to the defendant, on the ground that their father, on account of his second marriage, inherited only the usufruct during life of the property left by Solomon Verret, their brother; but that the right to the said property rested in them, and therefore, he was without any power or title to sell the same.

The defendant pleaded the prescription of ten years, based on possession, good faith and a just title.

The plaintiffs' right to the property sold by their father is asserted under article 227, page 258, of the old Civil Code. By this law the surviving husband or wife who marries again, is forbidden to dispose of the property which he or she inherits from some of the children of the first marriage, these effects being reserved for the children of said marriage. This provision is evidently taken from the 15th law of Toro, which provides that "in all cases in which women shall contract a second marriage, they shall be bound to reserve to the children of the first marriage the property they shall hold from the first husband, or shall have inherited from any of the children of the first marriage. The same obligation to reserve shall exist for men who marry a second or third time, so that whatever the law ordains as to women marrying a second time, applies to men who marry a second or third time.

The opinion we have formed on the law invoked by the plaintiffs, as applicable to the facts of this case, renders it unnecessary for us to notice several questions argued at bar.

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So, the provision in article 227, page 258 of the old Civil Code, that the surviving husband or wife who marries again is forbidden to dispose of the property inherited from any of their deceased children of the first marriage, it being reserved for the children of that marriage, is taken from the 15th law of Toro.

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The Civil Code of 1808 is a digest of the civil laws which were in force in Louisiana, and the re-enactment of them did not repeal the exceptions which limited their operation under the Spanish jurisprudence.

But the Spanish laws make an exception, that the surviving spouse, on marrying again, is not bound to reserve property acquired otherwise than by inheritance, for the children of the first marriage. It becomes his absolute property, if it has been purchased by his deceased child, from the moment of his death.

The old Civil Code of 1808, being a digest of the civil laws which were in force in this country when it was adopted, it has always been held by this court that their re-enactment in that work did not repeal the exceptions which limited their operations under the Spanish jurisprudence. See *Duncan's Executors vs. Hampton*, 6 *Martin, N. S.*, 38.

This obligation to reserve, which was imposed as a penalty on the surviving spouse who contracted a second marriage, was restricted by several exceptions, which we find laid down in the writers; one of them was, that this obligation to reserve did not extend to property acquired by the children of the first marriage otherwise than by inheritance from the deceased father or mother, whose memory was supposed to have been offended against by such second marriage; but that whatever the children of the first marriage acquired by inheritance from any other relation or stranger, by donation, sale, exchange, by their own industry, or in any other way whatsoever, except by inheritance from their deceased father or mother, was not embraced in the obligation to reserve, and became the absolute property of the surviving spouse. *Febrero*, part 1, cap. 3, No. 2; *Idem.*, part 2, lib. 11, cap. 5, § 1, No. 9, and § 11, No. 16; *Gomez ad Legis Tõri*, 14, 15 and 16, No. 2.

In this case the evidence shows that Solomon Verret purchased the property which is the subject of the present controversy, from one Peter Daspit, a great number of years after the death of his mother, and but a few months before his own. It is not shown what estate was left by Jacques Verret's first wife; nor is it pretended that the land was acquired by money derived from her. We must then say, that on the death of Solomon Verret, his father acquired an absolute and unconditional ownership in the property he afterwards sold to the defendant.

It is, therefore, ordered, that the judgment of this court remain undisturbed.

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APPEAL FROM THE SAME DISTRICT.

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VS.

GOVE.

For the reasons set forth in the case of the same plaintiffs against Theriot, the judgment rendered in this case must remain undisturbed.

COMMERCIAL BANK VS. GOVE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Notice of protest "left at the office of the defendant, *he not being in*," is sufficient to bind him as endorser.

This is an action against the maker and endorsers of a promissory note, duly protested; and the notary certifies that he delivered notice of protest to the first endorser and payee, in person; and left notice for the defendant, who is the second endorser, "*at his office, he not being in*." The defendant pleaded a general denial. The others made default. There was judgment against all the defendants *in solido*, and the second endorser appealed.

C. M. and F. B. Conrad, for the plaintiffs.

Durell, for the appellant.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment against him as endorser, and seeks its reversal on the ground of irregularity and insufficiency of notice of protest.

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BANK

OF

GOVE.

The certificate of the notary shows that "notice was left at the office of the defendant, he not being in."

We are of opinion the inferior court did not err.

It has been held, and is so laid down in *Bayley on Bills*, edition of 1826, page 176, "that sending a verbal notice to a man's place of business at a time when he or some of his people might be reasonably expected to be there, is sufficient; and that it is not necessary to send or leave a *written* notice; or to send to the house where he lives."

In this case the notary called and delivered the notice at the *office* of the defendant.

In New-York, it was deemed sufficient notice to the endorser, where he had shut up his house in town temporarily and retired to his country-house, to put the notice in the key-hole of the house in town. *Stewart vs. Eden*, 2 *Cain's Reports*, 121.

Chancellor Kent says, "the notice in all cases is good if left at the dwelling-house of the party in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still the notice may be left there." 3 *Kent's Commentaries*, 107.

If a person has an office where he transacts business, there is no place where notice may be more safely left, to bring the knowledge of it home to him, than there. We conclude, therefore, that service of notice was properly made in this case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed with costs.

BANK OF LOUISIANA VS. MANSKER ET AL.

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March, 1840.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
EAST BATON ROUGE.

BANK
OF LOUISIANA
VS.
MANSKER ET AL.

Notice of protest "delivered at the store of the defendants," without stating
with whom, is sufficient to bind them as endorsers.

This is an action against the maker and endorsers of a promissory note.

The endorsers pleaded a general denial, and alone made defence.

The note sued on was regularly protested, and the notary certifies that he "delivered notice of protest at the store of Mansker & Dewey, (the endorsers) in the town of Baton Rouge."

On the trial, when the protest and certificate of the service of notice were offered in evidence, the defendants, by their counsel, objected to them, on the ground that the protest purports to be a copy of the original on file, whereas the law only makes a copy from the record evidence; and that the notice is insufficient. The papers were received, and the defendant's counsel excepted. But the district judge was of opinion there was not sufficient service of notice of protest to bind the endorsers; and non-suited the plaintiff, who appealed.

Brunot, for the plaintiff and appellant.

T. G. Morgan, contra.

Martin, J., delivered the opinion of the court.

The defendants are sued as endorsers of a promissory note. They had judgment of non-suit in their favor, and the plaintiff appealed.

The only question which this case presents, relates to the service of notice of protest. The notary certifies that he "delivered the notices at the store of the defendants" in the town of Baton Rouge.

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BRUMFIELD
VS.
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It is urged that this service was irregular and insufficient, because it is not shown that there was personal service made on the defendants; or that the notice was left with a proper person so as to bind them as endorsers.

This case cannot be distinguished from that of the Commercial Bank against Gove, just decided; *ante*, 113. The notice was, therefore, regular and sufficient.

It is, therefore, ordered, adjudged and decreed, that the judgment of non-suit be annulled and reversed. And it is further ordered and decreed, that the plaintiff recover from the defendants, James Mansker and Oran Dewey, *in solido*, the sum of six hundred dollars with five per cent. per annum interest, from the 6th day of April, 1839, until paid; and four dollars and fifty cents the cost of protest; and also the costs of suit in both courts.

BRUMFIELD VS. MORTEE'S ADMINISTRATRIX.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF
ST. TAMMANY.

The court should carry into effect the meaning of the parties, by correcting an error of calculation, apparent on the face of the papers.

Where judgment by consent was entered up for one thousand dollars less than the amount of the notes sued on, this court altered the judgment to the true sum, and when it was not specified or asked for in the petition, but appeared from the notes annexed.

This case is brought up on an appeal by the plaintiff to have the judgment below corrected, and the true sum allowed.

The case is fully explained and the facts stated, in the opinion of this court, which follows:

Hennen, for the plaintiff.

Penn, contra.

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Morphy, J., delivered the opinion of the court.

This suit was instituted to recover two notes, one for three thousand seven hundred and twenty dollars, the other for one thousand three hundred and twenty-five dollars, making together a sum of five thousand and forty-five dollars; the two notes are correctly described in the petition, but the prayer is, "that judgment may be rendered for the amount of said two notes, to wit, four thousand and forty-five dollars," instead of five thousand and forty-five dollars, their real amount. This error is also to be found in the body of plaintiff's petition, but reference is made to the two notes and instruments of protest annexed to it. Defendant set up divers matters in defence, tending to show that the plaintiff was not the real owner of the notes, and that there had been a failure of consideration.

On the day of trial, an agreement was entered into in the following words and figures.

"PROBATE COURT, PARISH OF ST. TAMMANY, LOUISIANA.

"*Nathaniel Brumfield*

vs.

"*Peter Morte's Estate.*

"*The Same*

vs.

"*The Same.*

"It is agreed by the parties in these cases, that a judgment shall be rendered by the court for the amount claimed in plaintiff's petition, with interest and

costs of suit, with a stay of execution until the first Monday of April next.

(Signed)

"J. J. MORTEE and PENN,

"Attorneys for Defendants.

"ALFRED HENNEN,

"Attorney for Plaintiff."

On the same day, to wit, on the 13th of August last, this consent was filed in court by the defendant's counsel, and a judgment immediately drawn up and entered for four thousand and forty-five dollars only. This being discovered a few moments after by the plaintiff's counsel, he moved the court

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to correct the figure four thousand and forty-five dollars in the prayer of the petition, by inserting five thousand and forty-five dollars, the real amount of the two notes sued on. This the court refused to do on the ground that the consent rule had been handed in and filed by the defendant's counsel. Various efforts in different shapes were made by the plaintiff's counsel, to obtain relief from the effects of this palpable error, and the surprise of which he alleged to have been the victim. Those efforts and their want of success, appear from several bills of exceptions and affidavits to be found in the record.

We will take it for granted that no surprise was originally intended. Nothing absolutely compels us to entertain a different opinion, although we think that when discovered, this error should have been corrected without rendering the interposition of this court necessary.

It is evident from the wording of this consent, that both parties were under the impression that a suit had been brought on each note, and that judgment was to be entered in both cases for the amount claimed in each petition, to wit: the amount of each note. Instead of that, the two notes had been sued on in the same petition; but this error of fact under which both parties were laboring, could not affect the substance of their agreement. It appears to us that no specific sum being mentioned in this consent, the court below could and should have carried into effect the apparent, and, we believe, the true meaning and understanding of these parties, by correcting an error of calculation apparent on the face of the petition and from the notes annexed to it for reference. We cannot sanction a proceeding by which the just rights of a party would be defeated. No one has stood up in this court to sustain this judgment, nor is it pretended that to obtain it, plaintiff consented to lose a thousand dollars on his debt, in addition to a stay of execution of eight months.

It is, therefore, ordered, that the judgment of the court below be reversed, and that plaintiff recover of the defendant, Ann Mortee, in her capacity of administratrix of the estate

of Peter Morte, five thousand and forty-five dollars, with legal interest from the 19th of January, 1838, until paid, with seven dollars costs of protest, and costs in both courts, and that defendant have a stay of execution until the first Monday in April next.

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VS.
NOE.

TIERNAN ET AL. VS. NOE.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF POINTE COUPEE, THE JUDGE OF THE SECOND PRESIDING.

Where a firm is interrogated on facts and articles, and one of the partners answers categorically, it is sufficient, unless each of the partners have been expressly called on to answer.

The right of being present when interrogatories are answered, is secured only to the party who requires his adversary to answer in open court.

Where the appeal is devolutive only, and no amicable demand proved, damages will not be given as for a frivolous appeal.

This is an action by the commercial firm of Tiernan & Co. against the defendant, on his promissory note. He pleaded the want of an amicable demand, and the failure of consideration; and also propounded interrogatories to the plaintiffs, to be answered under oath. Charles Tiernan, one of the plaintiffs, (the other two partners being absent,) went before Judge Jackson, in the city of New-Orleans, and answered categorically, and in the negative, each interrogatory.

There was judgment for the plaintiffs, and the defendant appealed.

Patterson, for the plaintiffs, urged the affirmance of the judgment.

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NOR.

Where a firm is interrogated on facts and articles, and one of the partners answers categorically, it is sufficient, unless each of the partners have been expressly called on to answer.

The right of being present when interrogatories are answered, is secured only to the party who requires his adversary to answer in open court.

Where the appeal is devolutive only, and no amicable demand proved, damages will not be given as for a frivolous appeal.

Stevens, for the defendant and appellant, insisted :

1. The court below erred by receiving the answers of one only of the plaintiffs, without the answers of the other two, and also, because no notice of the time and place at which they were to be made, had been given either to the defendant or his counsel. No order of the court was necessary in order to make it obligatory on the plaintiffs to answer them, as they had not put the pertinancy of them at issue. *Code of Practice*, articles 349, 350; 3 *Martin's Reports*, 497; 7 *Louisiana Reports*, 333; 10 *Idem.*, 412, 13 *Idem.*, 71.

2. The court below erred by rendering judgment in favor of the plaintiffs, even if the answers were correctly received; for there were the confessions and acknowledgments of two of the plaintiffs, showing that the consideration of said note had entirely failed, opposed to the answers of one.

3. The amicable demand was specially denied, and none was proved, yet the court below gave judgment against the defendant for costs.

4. The plaintiffs claim damages for a frivolous appeal. This is not a suspensive appeal, and even if it was, the damages could not be given, because the judgment gives interest at the rate of ten per cent. per annum. 12 *Louisiana Reports*, 421, 422 and 423; 13 *Idem.*, 428.

Morphy, J., delivered the opinion of the court.

Suit being brought by plaintiffs on a note of hand executed to their order by defendant. The latter admitted his signature, pleaded want of amicable demand, and failure of consideration. To make out this plea the defendant put interrogatories to plaintiffs, a late firm of this city. Two of the partners being absent from the state, the interrogatories were answered by Charles Tiernan, in the name of the firm, under a commission issued from the court below, at the instance of defendant. These answers show a good and valid consideration for the note sued on.

The appellant has made two points in this court, to wit :

1. That the answers of Charles Tiernan, one of the firm, are not evidence, being unaccompanied by those of his partners.

2. That those answers ought not to have been admitted by the judge below, because defendant had not been notified of the time and place at which said interrogatories were to be answered.

I. When a firm is interrogated, an explicit and categorical answer by one partner appears to us sufficient, unless the several answers of all its members have been expressly called for, which has not been done in this case.

II. The right of being present when interrogatories are answered before a justice of the peace, is secured only to the party who prays that his adversary be ordered to answer in open court. The party interrogated, if living in another parish, is not bound to repair to that parish where the suit is pending; but the party who puts the interrogatories must be notified when and where they are to be answered, that he may be present if he sees fit. *Code of Practice, articles 351 and 352.* No such prayer was made by defendant.

The damages prayed for by appellee cannot be allowed, the appeal being devolutive, and no proof having been made of any amicable demand before the institution of this suit.

It is, therefore, ordered, that the judgment of the District Court be annulled, avoided and reversed; and that plaintiffs do recover of defendant four thousand two hundred and twenty-nine dollars and fifty-two cents, with ten per cent. interest per annum, from the first of July, 1837, until paid, and the costs below made after the appearance of defendant, inclusively. The remaining costs in the District Court, and those of this appeal, to be paid by plaintiffs and appellees.

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TIERNAN ET AL.
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GRANET VS. HIS CREDITORS.

GRANET
VS.
HIS CREDITORS.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
EAST BATON ROUGE, THE PARISH JUDGE PRESIDING.

A mortgage executed after the debtor has sworn to his schedule, and applied for the benefit of the insolvent laws, is invalid as an undisguised attempt to give a preference to this creditor over others, after a sworn declaration of bankruptcy.

This case arises on an opposition to the tableau of distribution, filed by the syndics of the ceding debtor. On the 11th of June, 1837, B. Granet filed his schedule, and took the necessary oath in court, and prayed for the benefit of the insolvent laws.

The district judge, (Hon. Thomas G. Morgan) being a creditor, recused himself, and refused to make the usual order. On the 18th of July, 1837, the judge of the eighth district granted the order staying all proceedings against the person and property of the insolvent, and ordered a meeting of his creditors.

Villeneuve Le Blanc filed his opposition to the tableau made out by the syndics, claiming to be a mortgage creditor, in virtue of a conventional mortgage made and acknowledged by the ceding debtor the 12th of June, 1837, to secure several sums of money due to the mortgagee. This mortgage was executed the day after the mortgagor had declared and sworn to his insolvency in open court.

The judge presiding rejected the mortgage, and refused to allow the rank and privilege claimed, and the opponent appealed.

Burke, for the appellant.

The case was submitted without argument.

Morphy, J., delivered the opinion of the court.

Villeneuve Le Blanc, a creditor of the insolvent, is appellant from a judgment of the court below, dismissing his opposition to the tableau of distribution filed by the syndics.

He had claimed to be placed on the tableau as a mortgage creditor. It is difficult to conceive on what ground this appellant, or his counsel, could hope for a reversal of the judgment appealed from. The act of mortgage, under which he claims this preference, was executed on the 12th of June, 1837, for the purpose of securing him against certain endorsements previously given to the insolvent. The latter had, the very day before, presented to the judge of his district his schedule, sworn to according to law, and had tendered a surrender of his property to his creditors. Being a creditor, the judge recused himself, on the score of interest. The order for the acceptance of the surrender, and the meeting of the creditors, was subsequently made by the judge of the eighth district, to wit, on the 18th of July following, and the bilan filed on the 24th.

This mortgage, executed after Granet's sworn declaration of bankruptcy, was an undisguised attempt to give this creditor a preference reprobated by our laws, which consider the property of a debtor as the common pledge of all his creditors. *Louisiana Code, articles 3323, 3150.* But, independent of the presumption of fraud resulting from the time and circumstances in which this mortgage was granted, the record furnishes no evidence of its having been recorded in the office of the recorder of mortgages for the parish of East Baton Rouge, a formality necessary to give it effect against third persons.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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March, 1840.

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DUPUY vs. DASHIELL.

DUPUY
vs.
DASHIELL.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT FOR THE PARISH OF
IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

An order of seizure and sale against the third possessor, for a sum assumed, but the amount of which is left doubtful, will be set aside, and the party informed that his only remedy is by an ordinary suit.

This is an executory proceeding against the third possessor of a tract of land and slaves. The plaintiff alleges, that on the 13th of August, 1828, he sold the premises to one Timoleon Lesassier, who, in 1836, sold them to the defendant, and who, by notarial act, assumed and bound himself to pay the balance due on the original sale. The plaintiff alleges, that the original purchase money is unpaid, and prays for an order of seizure and sale against the land and slaves in the possession of the third possessor.

The order was granted for the entire sum claimed on the original mortgage and the assumption of the defendant to pay, without any oath that the whole sum was due, and that it had been in vain demanded of the original debtor more than thirty days before obtaining the order.

The act of sale from Lesassier to Dashiell states, "that by an inspection of the records of mortgages, the property is subject to the following mortgages: One in favor of M. Dupuy, on the first portion of said land and nine slaves, for the amount of thirteen thousand and two hundred dollars, and interest of this debt; the vendor declares that he has paid all the interest due, and about four thousand dollars: Now, it is agreed that the sum of eleven thousand dollars capital, with interest thereon," &c. The act goes on to stipulate the manner of payment, and specify the other mortgages and incumbrances.

The defendant appealed from this order of seizure.

Ives, for the appellant, contended:

1. No oath was made by plaintiff on obtaining the order of seizure and sale that the debt was really due, and that he

had in vain demanded payment from his debtor thirty days previous to his bringing his suit, nor was any oath or affidavit made as required by law. BATTISTE DASHIELL
March, 1880.

2. Judgment is erroneous in being given for too much. Defendant's vendor declares, that he, the said vendor, had paid all the interest and about four thousand dollars of plaintiff's claim, and defendant assumed to pay only the balance; the act of mortgage is prescribed against, and is null.

3. No amicable demand was made upon the original debtor; and no ten days, or other notice, were given to defendant, by plaintiff, of failure of payment on the part of the original debtor. Nor were the three days notice to pay, given to defendant.

Hiriart and Burke, contra.

Bullard, J., delivered the opinion of the court.

This is an appeal from an order of seizure and sale granted at chambers, upon the presentation of authentic evidence of a mortgage on the property ordered to be seized. It appears that the property belonged originally to Dupuy, who sold to Lesassier, reserving a mortgage; and that Lesassier sold to the present defendant and appellant, who assumed to pay the plaintiff's claim.

The clause in the act of sale from Lesassier to Dashiell, upon which this proceeding is founded, is as follows: "and, whereas, it appears, &c., that the said property is subject to the following mortgages: 1st. One in favor of Marcel Dupuy, on the first portion of said land, and on nine of said slaves, for the amount of thirteen thousand and two hundred dollars, and interest of this debt. The vendor declares that he has paid all the interest and about four thousand dollars. Now, it is agreed that the sum of eleven thousand dollars capital," &c. Here the copy is so defective, from an omission, that we are compelled to conjecture an assumption on the part of Dashiell to pay. But it is clear and even admitted during the argument, that the order of seizure issued for too

An order of seizure and sale against the third possessor for a sum assumed, but the amount of which is left doubtful, will be set aside, and the party informed that his only remedy is by an ordinary suit.

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BERNARD
VS.
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much according to the evidence before the judge who granted it. The amount appears to have been left open by the parties for ulterior adjustment, and as the sum due and assumed to be paid, is left doubtful, the plaintiff ought to proceed by ordinary suit.

It is, therefore, ordered and adjudged, that the order of seizure heretofore granted by the district judge, be rescinded, reversed and annulled, and that the plaintiff pay the costs of both courts.

BERNARD VS. PYBURN.

**APPEAL FROM THE COURT OF THE THIRD JUDICIAL DISTRICT, FOR THE
PARISH OF EAST BATON ROUGE, THE JUDGE OF THE DISTRICT PRESIDING.**

The verdict of the jury in two trials, on mere questions of fact, when not clearly erroneous, will not be disturbed.

The plaintiff charged the defendant's slave with killing one of his slaves, worth fifteen hundred dollars, at the instance of his master, and for which he is liable for his value, and damages for other losses sustained thereby.

The defendant denied all the allegations except the killing, which he averred was occasioned by the illegal and felonious conduct of said slave whilst committing a felonious act in killing his (defendant's) hogs. He denies that he is liable in any way; and that no amicable demand was ever made.

On these issues the cause was submitted to trial before the court and a jury. There was much testimony taken; upon which the jury were unable to agree the first trial, and at the two last, there were verdicts for the defendant. From judgment on the last one the plaintiff appealed.

R. N. and A. N. Ogden, for the plaintiff.

Elam, contra.

Simon, J., delivered the opinion of the court.

This suit was instituted by the plaintiff to recover of the defendant the value of a negro, alleged to have been shot and killed by one of defendant's slaves, through the order of his master, and in consequence of his malice, negligence or imprudence.

The defendant pleaded the general issue; that the death of plaintiff's negro was occasioned solely by his own illegal and felonious conduct, and whilst in the perpetration of a felonious act in the killing of defendant's hogs, at ten o'clock at night; and that the killing of plaintiff's negro was merely accidental and without any malicious intention on the part of defendant, or his slave.

This case was tried three times in the District Court; there was a mis-trial; two verdicts were found by the jury in favor of the defendant, and the plaintiff appealed.

The whole matter in issue being that of fact only, was left to the jury, who, twice in succession, thought that the evidence fully exonerated the defendant from the charges alleged against him. We have carefully examined the evidence in the record, and we are not able to say that the verdicts of the jury are so clearly erroneous as to require the interference of this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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BERNARD
VS.
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MUNICIPALITY NO. ONE *vs.* BROTHERS.

MUNICIPALITY
 NO. ONE
vs.
 BROTHERS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

The sale of a lot in New-Orleans, *before* the division of the city into municipalities, cannot be enforced or rescinded by the municipality in which the property is situated. This right can only be exercised by the Mayor, and commissioners of the sinking fund.

This is an action by Municipality No. One, to rescind the sale of a lot situated *within its limits*, to the defendant, on the ground that he has not complied with the terms of sale ; and that since the division of the city, the property reverts to the municipality in which it is situated. They pray for a rescission of the sale.

The defendant pleaded a general denial ; averred that the sale and adjudication gave him a good and valid title to the lot in question ; and that he had on his part been always ready to comply with the terms of sale.

On these issues, and testimony relating to the compliance with the terms of sale, the parish judge was of opinion the defendant was not in fault, and that the plaintiffs on the other hand, had no right to sue. There was judgment for the defendant, and the plaintiffs appealed.

The cause was submitted by the attorney for the municipality.

Schmidt, for the defendant, relied on the decision in 13 *Louisiana Reports*, in the case of the *same plaintiffs vs. Barnet*.

Bullard, J., delivered the opinion of the court.

This case is the same as that of the same plaintiff against *Barnet*, in all essential particulars, and involves the same questions, of law, *see* 13 *Louisiana Reports*, 344. No new arguments have been advanced to us, and we have seen no grounds for a change of opinion.

The judgment of the Parish Court, is, therefore, affirmed, with costs.

ROST VS. MAYOR ET AL.

EASTERN DIST.
March, 1840.APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.ROST
VS.
MAYOR ET AL.

The third section of the act of the legislature, approved March 6, 1834, which authorizes the corporation of New-Orleans, *to cause to be sold for the account of whom it may concern*, any objects or property whatever, which encumber the levee, streets, &c., and are suffered to remain in these places for a longer time than the ordinances permit, *is unconstitutional*, and the owner can recover the value of the objects thus sold, from the corporation.

The corporation possesses the power to abate nuisances and of removing encumbrances from the levee, streets, &c., at the expense of the proprietor.

This is an action against the corporation of New-Orleans, to recover the sum of three thousand five hundred dollars, the alleged value of two rollers of an iron sugar mill, and the iron and brass frame work belonging thereto, which, the plaintiff states, the corporation took forcible and illegal possession of, and caused them to be sold without any legal authority.

The corporation pleaded a general denial. On the trial it justified and offered evidence to show that the objects in question remained on the levee for a long while, in contravention of the city ordinances for the abatement of nuisances.

The following notice was given in evidence. "Whereas, several reports of the city surveyor have presented as a nuisance and an obstacle to the passage of the levee and streets, two iron cylinders, and an old boiler and several other pieces of cast iron, which have been obstructing the public way between Custom-House and Bienville streets for almost eighteen months: notice is hereby given, that if said obstructions are not removed *on a delay of five days* from this date, they will be sold at public auction, &c., for the account of whom it may concern at the expiration of said delay.

D. PRIEUR, Mayor."

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ROST
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The corporation justified its proceedings under the third section of an act of the legislature, approved March 6, 1834, explaining the extent of its powers, which provides among other things, that it may "order any objects, whatever may be their value, which may encumber the levee, streets, public places, &c., or prevent or embarrass the public use of the same to be removed, *or cause to be sold for the account of whom it may concern*, in the same manner and after such advertisements as shall be required by such regulations.

The parish judge, in an elaborate opinion, came to the conclusion that the law under which the corporation acted and justified its proceedings, was unconstitutional; that the owner of property could only be divested of it *by due process of law, &c.* There was judgment for the plaintiff for the amount of his claim, and the corporation appealed.

L. Janin, for the plaintiff, showed that the case of *Lanfear vs. Mayor et al.*, 4 *Louisiana Reports*, 97, is precisely a case in point, supporting this one, and that judgment should be affirmed.

Canon and Hoa, for the appellants.

Simon, J., delivered the opinion of the court :

The plaintiff sues to recover a sum of three thousand five hundred dollars, alleged to be the value of two rollers of an English iron sugar mill, and of the iron frame and brass works thereof, which, he states, were illegally taken possession of by the defendants, and by them caused to be sold for the sum of eighteen dollars, in his absence, without his knowledge, and in violation of his right of ownership.

There was judgment in the court below in favor of the plaintiff for the amount claimed, and the defendants appealed.

It appears that in consequence of an act of the legislature approved on the 6th of March, 1834, entitled "an act to explain the extent of the powers vested by law in the Mayor and City Council of the city of New-Orleans, and for other purposes," the corporation of New-Orleans thought them-

selves authorized to maintain a former ordinance prescribing, that all property remaining on the levee or in the streets, for a longer time than allowed by the police regulations of the city, should be removed or sold for the account of whom it may concern; and that by virtue of the said ordinance, and after several reports made by the city surveyor, the plaintiff's cylinder, and other objects, were sold at public auction. But the plaintiff contends that the act of the legislature and the ordinance of the corporation are unconstitutional, as their effect would be to divest citizens of their property without trial in due course of law.

This case presents exactly the same question as that decided upon by this court in the case of *Lanfear vs. Mayor et al.*, 4 *Louisiana Reports*, 97; except, however, that at that time, the ordinance of the corporation was not specially authorized by any law of the legislature; and this court was then of opinion, that not only any such power was not conferred by the act of incorporation, but that none such could be constitutionally conferred. We think the parish judge did not err in considering the third section of the law passed by the legislature on the 6th of March, 1834, as unconstitutional, and in declaring it to be so, so far as it authorizes the enforcing of a forfeiture, and empowers the corporation to divest the owner of his property without trial in due course of law. The object of the law was to give to the corporation the power of abating a nuisance, and if, in their opinion, there was any need of a special enactment of the legislature for that purpose, it seems to us that their object was sufficiently attained by obtaining the power of removing the encumbrances on the levee, streets, &c., at the expense of the proprietor; without being necessary to resort to unconstitutional means of redress.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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March, 1840.

MADER ET UX. VS. FOX.

MADER ET UX.

VS.
FOX.APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A supplemental petition, praying for a new order of seizure and sale, is *admissible*, if it do not alter the plaintiff's original demand, but is only a continuation of it, embracing instalments not due when the first was filed.

This case comes up on an appeal from an order of seizure and sale, granted on a supplemental petition of the plaintiffs.

The record shows, that Madame Fox, in January, 1837, purchased two lots of ground in faubourg Lacourse; No. 1, belonging to Madame Mader, for eight thousand five hundred dollars, and No. 2, belonging to P. E. Mader, the husband, for seven thousand five hundred dollars. The defendant assumed the payment of three notes given by P. E. Mader, for eight hundred and thirty-three dollars thirty-three and one-third cents each, bearing mortgage upon lot No. 2; and for the balance, she gave her two notes, bearing mortgage.

On the 20th January, 1838, after the defendant had paid about five thousand dollars, the plaintiffs obtained an order of seizure and sale against the property, for two thousand eight hundred and seventeen dollars then due, with cost of three protests and copies of the act; and also for eight hundred and thirty-three dollars thirty-three and one-third cents, the amount of a note due the 19th February, 1838, and for four thousand and eighty-three dollars thirty-three and one-third cents, due on note of 22d February, 1836, assumed, but not paid at maturity: an extension of time was given, until the 7th February, 1838; and also for the other notes assumed, when they become due.

An injunction was granted, stopping the sale under this seizure the 21st May following, on the alleged grounds, that no notice was given; that it was an *alias* order, under which the plaintiffs were proceeding; that there was no authentic act to support the order; and that no legal notice had been

published, nor any inventory and appraisement made of the property. This injunction was dissolved, on a rule taken by the present plaintiffs the 16th June following. The party appealed, but afterwards abandoned it.

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The plaintiffs in the seizure obtained a certificate from the clerk of this court, showing, that the appeal from the judgment dissolving the injunction had not been prosecuted, and on this showing took out a *pluries* order of seizure and sale, and were proceeding to seize and sell the mortgaged property, when they were stopped by a second injunction.

On the 8th May, 1839, there was judgment, discharging a rule taken by the plaintiffs in the seizure, to set aside and dissolve the injunction; but it *set aside the pluries order of seizure*, reserving to the plaintiffs therein the right of applying for another *pluries* order of seizure and sale in due course of law.

On the 6th June, 1839, the plaintiffs filed a supplemental petition, praying for an order of seizure and sale for a different amount, on other terms than the first, alleging that all the notes and payments were due, and that the property be sold for cash. The whole amount claimed was twelve thousand six hundred and fifty dollars, with interest and costs.

The defendant made an unsuccessful effort to set aside this new order, by a rule taken on the adverse party, on the following grounds:

1. That the supplemental petition altered the substance of the plaintiffs' original demand.

2. That no supplemental petition is admissible in the *via executiva*.

3. The supplemental petition was filed, and the order granted thereon, while the injunction was still pending and in force.

4. That the defences of payment and compensation made against the first writ and order, still exist against the second.

5. That if the injunction was dissolved by the judgment, then it was necessary to give the defendant notice of the judgment before proceeding to the execution of the same.

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6. The filing of the petition and granting the order were contrary to law, and not warranted by the evidence adduced.

The rule taken to set aside the new order was discharged, and an appeal prayed and granted to the defendant. A rule was also taken to set aside the appeal, which was dismissed.

Roselius, for the plaintiffs, urged the affirmance of the judgment.

Micou, contra, insisted that, for the reasons and grounds set forth, the order of seizure should be set aside.

2. The notes and sums claimed in the supplemental petition are not the original ones on which the mortgage rested, and consequently there was no authentic evidence to support the executory proceeding.

Martin, J., delivered the opinion of the court.

This case comes before us on two appeals taken by the defendant. The first is from the dissolution of an injunction, staying proceedings on an order of seizure and sale; the second is from the refusal of the judge to set aside a supplemental petition, and a new order of seizure and sale obtained thereon.

1. The injunction was dissolved on account of the insufficiency of the oath on which it was granted, the parish judge being of opinion that it was not conformable to article 304, of the Code of Practice. In this opinion we concur, and support the judgment.

2. The appellant complains that the supplemental petition, and the new order of seizure and sale which issued thereon, was improperly allowed and granted, and ought not to be sustained:

1st. Because it alters the substance of the plaintiffs' demand.

2d. That it was not admissible, in praying for summary process.

3d. The new order of seizure and sale was granted in violation of the injunction previously obtained.

4th. That the defence set up against the first order of seizure and sale remains in full force against the second. EASTERN DIST.
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5th. The judgment dissolving the injunction is not executory, no notice of it having been served on the defendant.

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6th. The order allowing the supplemental petition to be filed, and granting the new order of seizure and sale, was illegal, being contrary to law and the evidence.

It is a sufficient answer to all these grounds of defence to say, that, in our opinion, the supplemental petition does not alter the plaintiff's demand, but is a continuation of it, embracing instalments of the debt claimed in the original petition, which have become due since it was filed; that the injunction has been dissolved, and all the matters set up as a defence to the first order of seizure and sale having been held unavailable and insufficient, they cannot be opposed to the second or present one.

A supplemental petition, praying for a new order of seizure and sale, is admissible, if it do not alter the plaintiff's original demand, but is only a continuation of it, embracing instalments not due when the first was filed.

It is, therefore, ordered, adjudged and decreed, that both judgments of the Parish Court be affirmed, with costs.

CARMAN ET AL. VS. ANDERSON, TUNSTALL & CO.;
ANDERSON & JOHNSON, INTERVENORS.

APPEAL FROM THE PARISH COURT OF NEW-ORLEANS.

Where it is shown that the proceeds of certain cotton has been passed to the credit of the intervenors on the books of the defendants, the cotton will be liable to the attaching creditors of the latter.

The plaintiffs instituted suit against Anderson, Tunstall & Co., as endorsers of a note for one thousand four hundred and two dollars and ninety-one cents, and attached a quantity of cotton in the hands of Wm. Bogart, in New-Orleans.

Anderson & Johnson, residing in Mississippi, intervened, claiming to be the owners of twenty-six bales of the cotton attached.

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The evidence showed, that Anderson & Johnson both, had running accounts with the defendants; and that the twenty-six bales of cotton now claimed, had been delivered to the defendants, and the amount or proceeds passed to the credit of the intervenors respectively, so as to vest the cotton absolutely in the defendants. There was judgment dismissing their petition of intervention, and they appealed.

Peyton and *T. N. Peirce*, for the appellants.

Lockett and *Micou*, contra.

Morphy, J., delivered the opinion of the court.

This is an attachment case, in which a devolutive appeal has been taken by the intervenors. They complain that their intervention was improperly dismissed. They had claimed some cotton attached in the hands of W. Bogart, as belonging to the defendants. We have examined the evidence given in support of their claim, and nothing in it satisfies us that the judge below has not decided correctly.

It is, therefore, ordered, that the judgment of the court below be affirmed, with costs.

CARMAN ET AL. VS. ANDERSON ET AL.
BOGART, GARNISHEE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A garnishee cannot withhold funds claimed by intervenors, whose claim is dismissed and pending on appeal. It does not suspend the execution of the plaintiff's judgment against the debtor in which the funds were attached.

The plaintiffs having obtained a judgment against Anderson, Tunstall & Co., for one thousand four hundred and two dollars and ninety-one cents, with interest and costs, and attached a quantity of cotton in the hands of Wm. Bogart, as garnishee, took out execution, under which the sheriff seized and collected two hundred and sixty-five dollars from the garnishee.

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The plaintiffs' counsel took a rule on the garnishee, to produce in court an account of sales of the cotton attached in his hands, and to pay over so much of the proceeds as will satisfy their judgment. He rendered his account, showing only two hundred and sixty-five dollars, the amount paid the sheriff, after deducting one thousand one hundred and sixteen dollars and forty-seven cents, the proceeds of twenty-six bales, claimed by the intervenors, and pending on an appeal.

On the trial of the rule, the parish judge was of opinion that the appeal taken by the intervenors did not suspend the execution of the judgment obtained by the plaintiffs against their debtor, and that, consequently, the cotton attached was liable to be taken in satisfaction. From this judgment, the garnishee appealed.

Peyton and Peirce, for the appellant.

Lockett and Micou, contra.

Martin, J., delivered the opinion of the court.

This is an attachment suit, in which the plaintiffs attached sixty-three bales of cotton, the property of the defendants, in the hands of W. Bogart, as garnishee. Having obtained a judgment for the sum of one thousand four hundred and two dollars and ninety-one cents, with interest and costs, against the defendants, the plaintiffs took a rule on the garnishee to produce in court an account of sales of the cotton attached, and to show cause why the proceeds should not be paid over to them, in satisfaction of their judgment. The garnishee rendered his account, but deducted the sum of one thousand

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A garnishee cannot withhold funds, claimed by intervenors whose claim is dismissed and pending on appeal. It does not suspend the execution of the plaintiff's judgment against the debtor in which the funds were attached.

one hundred and sixteen dollars and forty-seven cents, being the proceeds of twenty-six bales, to be held subject to the claim of Anderson & Johnson, who had intervened in the original suit, but whose petition of intervention had been dismissed, from which they appealed, and the appeal was still pending. The rule was made absolute, and the garnishee appealed.

It appears to us, the Parish Court did not err. The appeal taken by the intervenors did not suspend the execution of the judgment which the plaintiffs had obtained against the defendants, their debtors. The attachment covered the whole of the cotton, and gave the attaching creditors the preference to be first paid from its proceeds.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

HEATH ET AL. VS. HOWELL & JOHNSON.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The members of a firm doing business as carpenters, and signing the name of their firm to a note, are only liable *jointly*, and not jointly and severally.

The defendants, doing business as carpenters, are sued on their promissory note, signed "Howell & Johnson," and judgment is prayed against them *in solido*.

The defendants pleaded a general denial, averring that they carried on the business of carpenters.

There was judgment, that the plaintiffs recover of Howell & Johnson the sum of five hundred dollars, &c. From this judgment they appealed.

Randall, for the appellants, insisted, that the judgment was erroneous in condemning the defendants *in solido*, who, by their answer, show they carry on the business of carpenters; and there is no evidence to show they are bound *in solido*.

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I. W. Smith, contra, prayed for the affirmance of the judgment, with ten per cent. damages.

Morphy, J., delivered the opinion of the court.

The defendants, being sued on their note of hand, and sought to be made liable *in solido*, answer by a general denial, and describe themselves as carrying on the trade of carpenters. Judgment was given against them, and, after failing to obtain a new trial below, they have appealed.

The only point made by the appellants, which we deem it necessary to notice, is, that defendants should not have been condemned *in solido*. The judgment, it is true, does not contain the terms *in solido*, but it would probably be construed with reference to the pleadings, and the appellants, if not bound in that way, have a right to protect themselves against such a construction, by having the judgment properly amended. We find no evidence in the record that the defendants, who are carpenters, and have associated to carry on their trade together, have done any of those acts which would impart a commercial character to their partnership. They are liable, then, only *jointly*, and not jointly and severally. *Louisiana Code*, 2796, 2844.

It is, therefore, ordered and decreed, that the judgment of the court below be so amended as to render the defendants' obligation to pay under it joint only, and not joint and several, as prayed for by plaintiffs, and that the costs of this appeal be borne by the latter.

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SHIRLEY VS. FABRIQUE.

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APPEAL FROM THE PARISH COURT, FOR THE CITY AND PARISH OF
NEW-ORLEANS.

Where the appellee resides in any of the parishes within the state, service of citation must be made *personally* on him or at his domicil, or the appeal will be dismissed.

Every claim against a steam-boat, ship or vessel, on the last voyage, for wages, supplies, materials, &c., for which the Louisiana Code gives a privilege, will be allowed, when the services, supplies, &c., have been rendered and furnished within and during the last sixty days before suit.

Sixty days will be taken as the duration of the last voyage, within which all privileged claims against vessels depending on this voyage must be presented and enforced.

This suit commenced by attachment. The plaintiff sued the defendant as one of the makers of a promissory note, and attached the steamer Manchester, which he owned and commanded, to secure payment.

Several creditors of the boat intervened, and set up various privileged claims for wages, supplies, and materials furnished, &c., most of which were allowed.

The parish judge adopted the rule, that "every claim for wages, supplies, materials, &c., for which the Code gives a privilege on ships or vessels *for the last voyage*, should be allowed when the services have been rendered, or the supplies, materials, &c., have been furnished *during the last sixty days*."

Acting upon this principle, the amount of privileged claims allowed were equal or more than the value or proceeds of the boat.

The plaintiff and attaching creditor took an appeal, but it was only available against one of the privileged claimants.

I. W. Smith, for the plaintiff and appellant :

1. There are but three rules by which the voyage can be ascertained : 1st, When the departure of the vessel from one

port, and her arrival in another are proved; 2d, When, without arrival in another port, more than sixty days have elapsed before her return to the port of departure; 3d, When the vessel, bound on a voyage of long course, has been more than sixty days on her way, without claim of privilege. *Louisiana Code*, 3212; *Code de Commerce*, 194.

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2. The second rule for a voyage applies only to vessels upon fishing, trading, and other similar voyages. They may touch, load and unload at a dozen successive ports before they return to the port of departure. These partial voyages are to be taken cumulatively, and form but one principal voyage. 3 *Pardessus, Cours de Droit Commercial*, p. 570, No. 950; 1 *Boulay Paty, Droit Maritime*, 166; 2 *Emerigon*, 53. The third rule applies only to those ships which traverse the ocean, or make other very distant voyages. 1 *Boulay Paty*, 164, 5; 3 *Pardessus*, 14, 15.

3. The first rule governs this case. New-Orleans was the port of departure. Harrisonburg, after a navigation of eight or nine days, was the port of arrival. The distance between the two ports is not to be estimated. 1 *Boulay Paty*, 165; 3 *Pardessus*, 570, No. 950. In the discussion of the article in the *Conseil d'Etat*, it was suggested to fix the distance of any two ports for a voyage, but the suggestion was not acted on. By the French law, this would not be a voyage, for want of the interval of thirty days. Our jurists, in borrowing the same law from the Commercial Code, have adopted the views of the jurists of the *Corps Législatif*, when the law was presented to them in committee, viz.: to strike out of it the words, "*et trente jours après le depart.*" And why? "*Ils pensent,*" as the *procès verbal* informs us, "*qu'il suffit que le navire ait navigué d'un port à un autre port.*" 18 *Loché, Législation, &c.*, 260. *Idem.*, 372. By our law, there is no limitation, either of distance or time, to make a voyage; eight days answer as well as thirty.

4. By the second clause of article 3204 of the Code, the privilege is given, if the vessel has already navigated, for supplies, materials, &c., before her departure. By departure on the second voyage, this privilege is lost. 8 *Louisiana*

EASTERN DIST. *Reports*, 188, "*Abat vs. Nartigue*." Nearly all the supplies, materials, &c., were furnished before her two last voyages.

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5. There is no privilege in favor of Walton & Co., for premiums of insurance, because there is no evidence when the debt for insurance accrued; because notes at ninety days were taken for the insurance; and because payment, by Walton & Co., agents of the boat, of said notes, extinguished the debt for premiums.

Hoffman, Vason and Ives, for the appellees.

Simon, J., delivered the opinion of the court.

This is a suit brought, by attachment, against the defendant, to recover from him a sum of five thousand dollars. The attachment was levied on the steamer *Manchester*, as the property of the defendant, and, during the pendency of the suit, several creditors intervened, claiming divers privileges on the proceeds of the sale of the boat. By an agreement entered into between all the interested parties, *pendente lite*, the property attached was sold on a credit of six and twelve months, the proceeds thereof remaining subject to the order of the court.

After a full and minute investigation of the contradictory rights of all the parties, the parish judge came to the conclusion that seven of the intervenors were not entitled to any privilege on the boat, and that all the other intervenors, thirteen in number, should have judgment by privilege for certain sums of money, amounting altogether to three thousand three hundred and twenty-eight dollars and sixty-nine cents, to be paid to them respectively, according to their rank, out of the proceeds of the sale of the property, and as directed by the article 3205 of the Louisiana Code, in case of insufficiency. From that judgment, the plaintiff took the present appeal.

From the returns of the citations of appeal, it appears that only two of the intervenors, Linn Woodward and Walton & Co., were cited to appear before this court; and therefore the judgment of the lower court should only be inquired into in

relation to the two appellees that have been cited; but it is contended by Linn Woodward, that the appeal ought to be dismissed as against him, because, his domicile being shown to be in the parish of Iberville, where he has permanently resided, the citation of appeal could not legally be served upon his attorney. It is clear that the service of the citation of appeal in this case ought to have been made on Linn Woodward personally, or at his domicile, as the service thereof upon his advocate is only permitted in case the appellee does not reside within the state. *Code of Practice, art. 582.*

Our inquiry is therefore confined to that part of the judgment of the Parish Court allowing Walton & Co. a privilege for the sum of seven hundred and seven dollars and three cents, a part of which is for premiums due for insurance, and paid by the intervenors as the agents of the boat. There is not any satisfactory evidence in the record, fixing the length of the last voyage of the steamer previous to her being attached; and were we to adopt the position taken by the plaintiff's counsel, that the intervenors are not entitled to any privilege under the article 3204 of the Civil Code, except when the services have been rendered, or the supplies, materials, &c., have been furnished for or during the last voyage, we should be without any data to fix the precise period of the privileges, or it would be so vague and uncertain, that we would be unable to render justice to the parties. It may be true, that a regular voyage from New-Orleans to Harrisonburg does not take more than from fifteen to twenty days, but circumstances may prevent the boat's return to the city, and there are instances in which, during the low stage of the waters, steam boats have been detained for more than a month. Under this view of the case, we think the parish judge was correct in adopting, as his rule, on which the right of privilege should be based, the period of sixty days previous to the issuing of the attachment; and we come the more readily to this conclusion, that it appears to have been the general and uniform construction put on the articles of our Code in relation to our inland navigation.

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Where the appellee resides in any of the parishes within the state, service of citation must be made personally on him or at his domicile, or the appeal will be dismissed.

Every claim against a steam-boat, ship or vessel, on the last voyage, for wages, supplies, materials, &c., for which the Louisiana Code gives a privilege will be allowed, when the services, supplies, &c., have been rendered and furnished within and during the last sixty days before suit.

Sixty days will be taken as the duration of the last voyage, within which all privileged claims against vessels depending on this voyage must be presented and enforced.

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**BOGEREAU
vs.
ARMSTRONG.**

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, at the costs of the appellant, with regard to all the intervenors except Walton & Co., and that, as to them, the judgment of the Parish Court be affirmed, with costs.

BOGEREAU vs. ARMSTRONG.**APPEAL FROM THE CITY COURT OF NEW-ORLEANS.**

Appeal dismissed for want of a statement of facts, bill of exceptions, &c., to enable the court to examine the case on the merits.

This is an action against the maker and endorser of a promissory note. There was judgment by default confirmed, and one of the defendants appealed. No evidence came up in the record, except the note and protest.

Biron and *Mace*, for the plaintiff, prayed the affirmance of judgment, with damages.

Macready, contra.

Bullard, J., delivered the opinion of the court.

In this case there is neither statement of facts, nor special verdict, nor bill of exceptions, nor assignment of errors, nor any other means afforded, by which the correctness of the judgment and proceedings below can be tested.

The appeal is, therefore, dismissed, with costs.

TYSON *vs.* M'GILL.EASTERN DIST.
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APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

TYSON
vs.
M'GILL.

In whatever place the defendant may reside, the prescription of five years runs in his favor, even against minors and persons interdicted.

A conditional offer by defendant, in a conversation with the plaintiff's counsel, "that he would pay the note if long time enough was given," does not amount to a new promise, and take the case out of prescription, so as to entitle the plaintiff to recover.

This is an action against the maker of two promissory notes, both of which were over due more than five years at the commencement of suit. The defendant pleaded a discharge under the insolvent laws of Missouri, and prescription.

On the trial, the defendant offered a judgment of discharge rendered by one of the courts in Missouri, which was rejected as evidence.

The evidence showed that the plaintiff resided in New-York, and the defendant at St. Louis, until after the notes became due.

The plaintiff's counsel deposed, that he called on defendant, who remarked, that he had formerly resided at St. Louis or Illinois; that he had come to New-Orleans, in 1835 or 1836, poor, "and would pay the note if long time enough was given him." They could not agree upon the time; and afterwards, in another conversation, the defendant declined paying the note.

There was judgment for the defendant, and the plaintiff appealed.

I. W. Smith, for the plaintiff and appellant:

1. Prescription did not begin to run until 1835 or 1836, when the defendant came from St. Louis or Illinois to reside in New-Orleans. In "*Douglas vs. Forrest*," the court state the rule to be, that "although the injury of which the plaintiffs complain has existed more than six years, yet they have

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no cause of action until there was some person within the realm against whom the action could be brought. Cause of action is the right to prosecute the right of action with effect; no one has a complete cause of action until there is somebody that he can sue." 15 *English Common Law Reports*, 430: see, also, "*Williams vs. Jones*," 13 *East*, 430; and "*Morgan vs. Robinson*," 13 *Martin*, 77. (12)

2. The plea of discharge under the insolvent act, in 1835, is an acknowledgment of the debt by the defendant. The prescription was then interrupted. The two pleas are inconsistent, except as to the time elapsed since 1835. The one is, as to the previous time, a waiver of the other. 1 *Trop-long*, "Prescription," 96, No. 71; "*Trapet vs. Verny*," 23 *Journ. du Palais*, 62.

3. The reply of defendant, that he had come here poor, and would pay the debt, if long time enough were allowed, takes the case out of the statute.

Preston and Larue, for the defendant.

Bullard, J., delivered the opinion of the court.

This is an action against the maker of two promissory notes due, the one on the 12th of May, and the other on the 12th of August, 1834; and the plaintiff is appellant from a judgment sustaining the plea of prescription. The suit was brought in October, 1839. In whatever place the defendant may have resided, the prescription of five years runs in his favor, even against minors and persons interdicted. *Articles 3505, 3506 of the Louisiana Code*. The conditional offer made by the defendant, in a conversation with the plaintiff's counsel, does not, in our opinion, amount to a new promise, which entitles the plaintiff to recover.

The judgment of the Commercial Court, is, therefore, affirmed, with costs.

MUNICIPALITY NO. ONE VS. LEROY.

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APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

MUNICIPALITY
NO. ONE
VS.
LEROY.

The vendor of a lot of ground situated in the limits of the Draining Company is not responsible in any way to the purchaser for the mortgage and claim which said company may have on the property sold, for draining and enhancing its value; nor can the latter withhold the price, or compel security to be given, as in case of a disturbance.

This is an action against the maker and endorser of a promissory note. The defendants admitted their signature, but denied that they were liable. They also aver that the note sued on was given in part payment of seven lots of ground, sold with full guaranty to Urbain Leroy, one of the defendants, but that he has since discovered they are situated within the limits of the first section of the New-Orleans Draining Company's operations, which has a mortgage and privilege on said lots given by the act approved March 19th, 1835, and he fears that he will be evicted.

There were some other matters set up in defence; and the defendants conclude with a prayer for the rescission of the sale; or that the plaintiffs be required to give security, in the sum of five thousand dollars, to secure the purchaser against disturbance and eviction.

The plaintiffs exhibited the note and protest in evidence, and had judgment against Leroy, and were non-suited as to the endorser. The defendant, Leroy, appealed.

Pichot, for the appellant, relied upon article 2535 of the Louisiana Code for redress; or that security should be given against disturbance from the mortgage of the Draining Company, before payment could be demanded.

Upton, for the plaintiffs and appellees, showed that the defendant had no *just reason* to fear a disturbance when the claim upon which that disturbance is predicated arises from an *improvement* of the property he had purchased. The article 2535 of the Code invoked did not apply to this case.

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MUNICIPALITY

NO. ONE

VS.

LEROY.

Morphy, J., delivered the opinion of the court.

The defendant, being sued on a note given for the purchase of some property in the rear of the city, resists payment on the ground that the lots sold to him by the plaintiffs are situate within the first section of the Draining Company; that the said lots were sold to him free from any mortgage or incumbrance, while the plaintiffs well knew that the company had a legal mortgage on the same; that he fears he may be evicted from the premises in consequence thereof. He prays that the sale of said lots be cancelled, or that the plaintiffs be decreed to give him good and sufficient security that he shall not be evicted or disturbed in the quiet enjoyment and possession of the same. We can hardly believe this defence a serious one, although presented with some degree of apparent correctness. What is the disturbance which the defendant avers that he has just cause to fear? It is one which can take place only through his own fault, or neglect, and for which no warranty is due to him by his vendor. If his land is drained, and, after receiving the benefit of this improvement, the defendant refuses to pay to the company the proportion of the enhanced value for which the law grants them a mortgage, he might truly be troubled and disquieted, but then it would not be on account of a pre-existing claim due by the plaintiffs, for they never promised or engaged to pay for the draining of the property sold to the defendant. The law creating the Draining Company, and granting them a mortgage on all property they should drain and improve, had been in force more than two years when this sale was made; it is even very probable that the fact of the operations of the company being about to be carried into that section, and the prospect of the consequent enhancement of the value of property in that neighbourhood, induced the defendant to make the purchase now sought to be annulled on that account; but be this as it may, and considering the mortgage as really threatening the defendant with a disturbance, it can in no way authorize a rescission of the sale, nor can it entitle the defendant to suspend the payment of the price, or require security, because before the

The vendor of a lot of ground situated in the limits of the Draining Company is not responsible in any way to the purchaser for the mortgage and claim which said company may have on the property sold, for draining and enhancing its value; nor can the latter withhold the price, or compel security to be given, as in case of a disturbance.

sale he was as well informed of this supposed danger of EASTERN DIST. eviction as the plaintiffs could be, by the promulgation of March, 1840. the law of 1835; *Louisiana Code, article 2535.*

BABCOCK ET AL.

VS.

ELDRIDGE.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

Bullard, judge, did not join in this case, having been of counsel.

BABCOCK ET AL. VS. ELDRIDGE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A witness who swears, to the best of his recollection, does not swear positively, and his testimony is insufficient to establish a positive fact, for want of certainty.

This is an action against the defendant as endorser of a promissory note for twelve hundred dollars, payable on March 1, 1831. The note is dated at Plaquemine, October 22, 1830, signed by Thomas J. Cunningham, and made payable to the order of the defendant, and by him endorsed in blank. This suit was instituted February 27, 1836.

The defendant admitted his endorsement; pleaded a general denial, and also averred, that he should not be required to answer, and be held liable in this case, as the plaintiffs have instituted suit against him in Kentucky, for the same cause of action, which suit he avers was pending at the time of filing the petition in this case.

He further states, that the note sued on was sold to a broker, at a discount of 12 per cent, under an agreement that he should in no way be responsible. Some other matters are set up not material, and not relied on. He also avers, there is no proof of demand and notice of protest.

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There was no proof of the pendency of the suit in Kentucky. The evidence showed that the note was brought to C. A. Warfield, by the defendant, to be negotiated; that the latter put his own name on it, and also procured the name of Mrs. P. Cunningham. The broker testified that, "according to his best recollection, the discount on the note was over ten per cent.; that he sold it for the best [price] he could get for it."

The notary states, in his certificate, that he gave notice to the defendant, by a letter put in the Post-office in New-Orleans, of even date with the protest, addressed to him at Paris, in the state of Kentucky. There were several depositions taken and read, on the subject of the defendant's residence. Some of the witnesses testified that they thought he resided in Millersburg, and others swore positively that his residence was in Paris (both towns in Bourbon county, Kentucky) at the time the note became due.

There was judgment for the plaintiffs for the amount of the note, without interest. The defendant appealed.

Maybin, for the plaintiffs and appellees, insisted that the judgment should allow interest, as the note was duly protested, and prayed that the judgment be amended in this respect.

Chinn, for the defendant:

1. The inferior court erred in rendering judgment against the defendant, the transaction being a *sale* of the note, and no liability rested upon defendant. See *Romero et al. vs. Segura*, 7 *Louisiana Reports*, 307.

2. There is no proof in the cause of notice of the dishonor of the note; the notary's certificate being insufficient. 2 *Wheaton*, 377; 2 *Martin*, 615.

3. The proceedings should have been abated, by reason of the pending of another suit.

4. Notice of protest should have been sent to Millersburg, Ky., the defendant's place of residence, instead of Paris. It is not legal so as to bind him.

Martin, J., delivered the opinion of the court.

This is an action against the payee of a promissory note endorsed by him in blank. The defendant pleaded a general denial, and set up several matters of defence on the merits. The only grounds which it becomes necessary to notice is, that the note was sold by the defendant to C. A. Warfield, a broker, at a discount of 12 per centum, under an agreement that he was in nowise to be responsible for its amount. The want of demand and notice are also relied on. There was judgment against the defendant for the amount of the note, *without* interest, and the plaintiff appealed.

The defendant and appellant has prayed the reversal of the judgment, on the grounds that he sold the note absolutely, and therefore incurred no liability as endorser; and that there is no proof of the demand and notice.

The defendant appears on the note as endorser, and has not shown that he did not incur the liability which attaches to him in that character.

The witness by whom usury is attempted to be proved, does not swear positively. He says, that, "according to the best of his recollection, the discount on the note *was over ten per cent.*" In our opinion this testimony is insufficient, on account of its uncertainty. The witness does not swear to any specific rate of discount, nor does he swear to any thing positively; the words "according to the best of his recollection," implying, in some degree, that he did not very distinctly recollect.

Legal demand and notice were duly proved.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiffs recover from the defendant the sum of twelve hundred dollars, with interest at the rate of five per cent. per annum from the 4th March, 1831, until paid, and three dollars costs of protest, with costs in both courts.

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VS.
ELDRIDGE.

A witness who swears to the best of his recollection, does not swear positively, and his testimony is insufficient to establish a positive fact, for want of certainty.

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GREEN vs. DAKIN & DAKIN.

GREEN
vs.
DAKIN & DAKIN.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The rule of the Commercial Court, authorizing either party, when the cause is at issue, to set it for trial on giving the opposite party three days notice, is not contrary to article 463 of the Code of Practice, requiring each suit to be called in its turn, and a day fixed for trial.

The members of a firm doing business as architects, and signing notes for the price of immoveable property purchased by them in the name of the firm, will only be bound *jointly*, and not *in solido*.

This is an action against the defendants on two promissory notes signed by them as a firm, (Dakin & Dakin) doing business as architects, and which were given in part payment of the purchase of several squares of ground in the town of Bloomingdale, in the parish of Jefferson. There were exceptions filed to the petition, which were overruled, and a general denial pleaded. The plaintiff had the cause fixed for trial under the third rule of court, authorizing either party to set the cause for trial on giving the opposite party three days notice.

On the day fixed, the defendants' counsel objected to go to trial; first, the cause had not been set down on the docket, in order that it might be called in its turn, and a day fixed for its trial; and, second, that defendants prayed for a trial by jury, which had not been waived.

There was judgment for the plaintiff against the defendants *in solido*, and they appealed.

I. W. Smith, for the appellants.

The court below erred in ruling them to trial. They had the right to have their cause placed on the docket of the court, fixed and tried in its turn, and not otherwise. *Code of Practice*, 463, 464. The third rule of the court below is contrary to law.

The defendants submit that they are only bound *jointly*. *Louisiana Code*, 2075. *Solidarity* is not here expressed, and

it cannot be presumed. *Louisiana Code*, 2088. The words are, "We promise," &c. See *Mayor &c. vs. Ripley et al.*, 5 *Louisiana Reports*, 120. There is neither allegation nor proof of a commercial partnership. *Louisiana Code*, 2796; *Duhameau vs. Levasseur*; 12 *Dalloz, Recueil Alphabétique*, p. 87, No. 1. And the plaintiff has failed to show any authority of the partner who signed the notes, to bind his co-partner in *solido*. *Louisiana Code*, 2843. The notes were given for land. This was not partnership property. *Skillman vs. Purnell, et al.*, 3 *Louisiana Reports*, 496.

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GREEN
VS.
DAKIN & DAKIN.

G. B. Duncan, contra.

Morphy, J., delivered the opinion of the court.

The defendants are sued on two promissory notes, given in payment of real estate bought of plaintiff. They offered no serious defence below, and were decreed in *solido* to pay the amount of the same.

They contend that they have been improperly ruled to trial in the court below; that they had the right to have their cause set down on the docket of the court, and fixed and tried in its turn, and not otherwise; and that the rules of the court below, under which they were forced to trial, are contrary to the Code of Practice, article 463.

The rules have been given in evidence, and we find them spread on the record. The third one complained of, provides "that any party may direct the clerk to fix for trial any cause in the possession of the court which is at issue; giving the opposite party three days notice of the trial." Article 463 of the Code of Practice, provides that "as soon as the answer has been filed in a suit, the clerk shall set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial." We have no evidence before us that the clerk did not do his duty in setting down this cause on the docket as soon as the answer was filed. And we do not perceive in what respect article 463 of the Code of Practice is violated by the rule complained of; for a case must be considered to be called in its turn,

The rule of the Commercial Court, authorizing either party, when the cause is at issue, to set it for trial on giving the opposite party three days notice, is not contrary to the 463d article of the Code of Practice, requiring each suit to be called in its turn, and a day fixed for trial.

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The members of a firm doing business as architects, and signing notes for the price of immovable property purchased by them in the name of the firm, will only be bound *jointly*, and not *in solido*.

under that article, when it is called and fixed for trial, according to the rules which that code authorizes the courts to enact for the despatch of the business before them. We have not the power, and still less the inclination, to interfere with the police and regulations of the inferior courts, unless they be manifestly contrary to law, and lead to gross injustice; which is not the case in this instance.

On the merits, the defendants contend that they are not bound *in solido*: their partnership not being of a commercial character. The plaintiff describes them in his petition to be architects, doing business as partners; but has not alleged or proved that they did any commercial business. The particular property for which these notes were given, would not have belonged to the firm, even if it had been a commercial one. We think, then, that the defendants are not liable *in solido*. *Louisiana Code*, article 2075, 2088, 2796; 5 *Louisiana Reports*, 120; 7 *Idem.*, 426.

It is therefore ordered, and decreed, that the judgment of the court below be so amended as to render the defendant's obligation to pay under it, joint only, and not joint and several, as prayed for by plaintiff; and that the costs of this appeal be borne by the latter.

LANDRY VS. SECOND.

APPEAL FROM THE COURT OF THE SECOND DISTRICT, FOR THE PARISH OF ASCENSION, THE JUDGE OF THE FOURTH PRESIDING.

The act of the wife, *retracting* her renunciation of her right of mortgage on her husband's property, must be made contradictorily with the creditor in whose favor she has renounced: so far, at least, that he should be notified of the passing of the act of retraction.

Without notice to the creditor, of the passage of the *act of retraction of* EASTERN DIST.
the renunciation of the wife, it will not interrupt the prescription of forty March, 1840.
 days, within which it must be passed, under the act of the 27th March,
 1835.

LANDRY
 vs.
 SECOND.

This case commenced by an opposition and injunction against the defendant's order of seizure and sale.

The plaintiff and opponent alleges, that she was separated in property from her husband, and had judgment with privilege and mortgage on all his property, for the sum of two thousand and twenty-four dollars, and costs. That the defendant has obtained an order of seizure and sale against sundry slaves, and has advertised them for sale. She prays that the amount of her judgment against her husband be first paid to her out of the proceeds of the sale of said slaves, &c.

The defendant pleaded a general denial. He denied that the plaintiff ever obtained judgment against her husband; or if she did, it was fraudulent and collusive; that if she had any mortgage or privilege, it was inferior in rank to his; and that she had renounced her right of mortgage in favor of his, and was precluded from setting up in opposition to him; and finally, that if she has ever been relieved from the effect of her renunciation, it is too late, as she has lost her remedy by prescription. He prays that her opposition and injunction be dismissed, and that the sheriff be commanded to pay over the proceeds of the slaves so seized and sold in satisfaction of his demand.

Upon these pleadings and issues, the cause was tried. The plaintiff offered in evidence to do away the effect of her renunciation of her right of mortgage, her *retraction* of the same by notarial act, the 4th June, 1835, under the law of the 27th March, 1835.

The counsel of the defendant objected to the reading of this document, on the ground that he had not been notified of the plaintiff's intention to retract her renunciation; that it could only be done by legal citation in a court of justice. The court received the document for what it was worth, conceiving that the objection went to the effect of the evidence,

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to which the defendant's counsel excepted. The law under which the plaintiff retracted, was approved March 27, 1835. The first section declares that all married women above twenty-one years of age, &c., who have renounced their mortgage for the restitution of their matrimonial, dotal, paraphernal, or other rights, *shall have the right of retracting the said renunciation, during only forty days which follow the promulgation of the present act, &c.*

The retraction here set up, was made and passed the 4th of June, 1835, without any notice to the creditor.

There was judgment in favor of the plaintiff sustaining her retraction and mortgage, and ordering her claim to be paid from the proceeds of the slaves seized and sold. The defendant appealed.

Ilsey and Nicholls, for the plaintiff and appellee.

J. Seghers, for the defendant.

Simon, J., delivered the opinion of the court :

Plaintiff makes opposition to the defendant's receiving the whole amount proceeding from the forced sale of certain property of her husband, on which she alleges to have a legal mortgage and privilege, and which had been seized and sold at the suit of the defendant, by virtue of a special mortgage. She prays that the proceeds of said sale be retained in the hands of the sheriff, until the further order of the court, to satisfy a judgment which she had previously obtained against her husband ; and which judgment, founded, as she states, on her said legal mortgage and privilege, is to be satisfied in preference to the defendant's claim.

The defendant pleads that the plaintiff has no right to make opposition, because, by a notarial act, she formally renounced her legal and tacit mortgage, and yielded her right of priority in his favor ; and he further contends, that, could she in law have been relieved from the binding efficacy of her act of renunciation, she has lost her remedy by prescription.

On the trial of the cause, the plaintiff produced a document purporting to be a notarial act of retraction, to annul the act of renunciation by her made in favor of defendant; and the said act, having been admitted in evidence, notwithstanding the opposition of defendant's counsel, he took a bill of exceptions. As the objection goes only to the effect of the document, it becomes unnecessary for us to examine the bill of exceptions.

The first section of the act of the 27th of March, 1835, is as follows: "That all married women, aged above twenty-one years, who, with the consent of their husbands, have, by act passed before a notary public, voluntarily renounced in favor of third persons, the mortgage which they had for the restitution of their matrimonial, dotal, paraphernal, and other rights, shall have the right of retracting the said renunciations during only the forty days which will follow the promulgation of the present act." And in the French text, the law says: "*Ne pourront revenir contre les renonciations susdites.*" The difficulty that arises, is to know in what manner the retraction is to be made, as the law leaves us entirely in the dark with regard to the formalities to be pursued. There is no doubt that the legislature intended to establish a prescription, after the expiration of which, the acts alluded to should become binding and obligatory; and were we disposed to put it under the ordinary rules of prescription, it would be necessary, in order to interrupt it, that the other party should be cited. But this law does not appear to us to go so far as to require a regular action of nullity, or rescission. Its expressions are: "*The right of retracting the said renunciations*"; and in French, "*Revenir contre*"; which, though meaning something more than a mere act of retraction, does not necessarily include the idea of an action. Endeavoring to explain one text by the other, we think that the intention of the legislature has been to give to married women the right of retracting their renunciations, not *ex parte*, but so far contradictorily with the party in whose favor the original act of renunciation was made, as to require at least that he should be notified of the

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The act of the wife, retracting her renunciation of her right of mortgage on her husband's property, must be made contradictorily with the creditor in whose favor she has renounced; so far at least, that he should be notified of the passing of the act of retraction.

Without notice to the creditor, of the passing of the act of retraction of the renunciation of the wife, it will not interrupt the prescription of forty days, within which it must be passed, under the act of the 27th March, 1835.

change of will of the obligor, and of the execution of the act of retraction. Was such an act permitted to be passed *ex parte*, and without the knowledge of the creditor, he might easily be made to believe that the act of renunciation has become binding and obligatory; and relying upon its validity, he might transfer his rights in good faith to others; and thereby, from the salutary object of the law, there would spring a source of litigation. We understand that whenever apparent rights exist, and particularly such rights as may become valid and executory after the lapse of time, they should not be destroyed by the *ex parte* act of one of the parties; and that the other should at least be notified of the fact or circumstance tending to interrupt or destroy said rights. This is one of the principles of prescription; and it seems to us that we are not violating the law, or going beyond its intention and meaning, in requiring that the creditor should have been notified of the passing of the act of retraction. It may be, that in general, no opposition to the retraction could be listened to from the creditors; but we are not ready to say that it would be so in all cases.

In this case, it is not pretended that the defendant was ever notified of the execution of the act of retraction produced by the plaintiff; and we think the district judge erred in considering said act of retraction as sufficient to interrupt the prescription of forty days, established by the act of the 27th of March, 1835; and that said prescription has been acquired in favor of defendant.

It is therefore ordered, adjudged, and decreed, that the opposition made by plaintiff be overruled and dismissed; that the injunction issued be dissolved; and that the defendant recover the sum due him out of the proceeds of the sale of the property of plaintiff's husband, in the same manner as if no opposition had been made by said plaintiff. It is further ordered, that the plaintiff pay costs in both courts.

PETERSON VS. SHORT.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

PETERSON
VS.
SHORT.

Whether a special contract between plaintiff and defendant is proved as alleged, *or not*, the plaintiff will be allowed a reasonable compensation for his work done for the defendant, who is not to be benefited by it without making compensation.

This is an action to recover damages for an alleged breach of a contract on the part of the defendant.

It seems the parties entered into a sort of special partnership, by which the plaintiff was to cultivate a piece of ground or garden of the defendant, the latter furnishing seeds, utensils, and a horse and cart; the proceeds to be divided. The plaintiff and his wife worked in this garden for about six weeks, when the defendant, without any apparent cause, dissolved the contract, and turned them adrift. There is no proof of damages. But the district judge was of opinion the plaintiff and wife ought to be paid for their labor; and, also, the sum of eighteen dollars paid by them to another laborer; gave judgment for forty-eight dollars in their favor; from which the defendant appealed.

R. Hunt, for the plaintiff.

Wills, contra.

Simon, J., delivered the opinion of the court.

The plaintiff states that, in consequence of the violation of a contract on the part of the defendant, he has suffered damages to the amount of two thousand dollars. The contract appears to be a sort of special partnership, for the purpose of cultivating a garden for the space of five years, and sharing equally the profits. It is shown in evidence, that plaintiff and wife worked for a short time in the garden, and paid eighteen dollars to a laborer. This case was tried without a jury, and the District Court gave judgment in favor of

EASTERN DIST. the plaintiff for forty-eight dollars, from which defendant
March, 1840. appealed.

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 COMPANY.

It does not not appear to us that the district judge came to a wrong conclusion in allowing the plaintiff a reasonable compensation for his work and that of his wife in the garden of the defendant; and whether a contract, such as alleged in the petition, existed or not, we see no reason why the defendant should benefit from plaintiff's labor, without compensation; and it would be unjust to deprive him of the value of his services.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

RONDEAU ET AL VS. NEW-ORLEANS IMPROVEMENT AND
 BANKING COMPANY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When there is not a sufficient number of jurors of the regular panel in attendance, no matter from what cause, the court is authorized to call on bystanders.

It is not a good cause of challenge that a juror has been summoned as a witness by either party. Jurors may be sworn to give ^{testimony} evidence to their fellow jurors.

This is an action for a balance due, and damages, to the plaintiffs, as plasterers, for work and labor done on the City Exchange, at the instance and under the employment of the defendants. They claim the sum of four thousand one hundred and twenty-seven dollars as the balance due, and damages, in consequence of being ordered to quit work before they had completed the job, as agreed on with the defendants.

The answer began with a general denial, and averred, that the plaintiffs overcharged for the work done, and failed to execute it in a workmanlike manner, &c. The defendants pray that the demand be rejected; and that they be allowed five thousand dollars as a reconventional demand on the plaintiffs, for losses and damages occasioned by their gross negligence and delay in the performance of the work.

The cause was submitted to a jury, who, on hearing the evidence of the parties, and receiving a charge from the judge, returned a verdict for the plaintiffs in the sum of three thousand nine hundred and twenty-seven dollars, with legal interest from judicial demand. Judgment was rendered confirming the verdict.

The defendants moved for a new trial, on the ground that the court allowed two jurors to be taken and sworn from the bystanders; and that there was error in the calculations of the jury, as to the amount paid to the plaintiffs.

There was a bill of exceptions, taken by the defendants, to the decision of the court, in allowing two jurors to be taken from the bystanders; and, also, in permitting two jurors to be sworn, who had been summoned as witnesses by the plaintiffs.

The motion for a new trial was overruled, and the defendants appealed.

Canon, for the plaintiffs.

Pichot, for the defendants.

Bullard, J., delivered the opinion of the court.

This is an action for work and labor done by the plaintiffs, as plasterers upon the City Exchange. There was a verdict and judgment in their favor, and the defendants appealed, after a motion for a new trial had been overruled.

We have not been favored with any arguments on either side, either written or oral, and consequently confine our attention to such questions of law as the record presents.

It appears by a bill of exceptions, that the counsel for the defendant objected to the summoning of bystanders to com-

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BEGLEY
VS.
MORGAN ET AL.

plete the jury, on the ground, that the only reason why there was not a sufficient number of jurors, of the regular panel, was, that a full jury had just retired to consult of their verdict in another case; and a further objection was made, that two jurors, already sworn, were summoned, as witnesses by the plaintiffs.

The court, we think, did not err. Whether the want of jurors was in consequence of absence from court, or because they were sworn in another case, was immaterial. The court correctly directed the jury to be completed, by calling bystanders. With respect to the two jurors already sworn, we think it is not a good cause of challenge, that a juror has been summoned as a witness by either party. It is every day's practice to swear jurors to give evidence to their fellow jurors.

Upon the merits, no good reason has been shown why the verdict should be set aside.

The judgment of the District Court is, therefore, affirmed with costs.

BEGLEY VS. MORGAN ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The Registry Act of Congress, passed in 1792, section 11, relating to ships and vessels, is only intended to regulate the national character of the vessel, and not to vest title in the new owner.

The transmission of a bill of sale to the purchaser, followed by its actual receipt, is a delivery to him, at the moment of the transmission, which takes effect from its date.

The plaintiff attached the supposed interest of the defendants in the steam-boat Wm. L. Robeson, on the 28th April, 1838.

Larkin F. Wood and others, intervened, and claimed to be the owners. Wood claimed to be the owner of all the interest of the defendants in said boat, in virtue of a bill of sale signed by them, and dated at Memphis, Tennessee, the 8th of April, 1838, and which they enclosed in a letter addressed to the firm of Larkin F. Wood & Sinnott, in New-Orleans, dated at the former place, the 24th of April, 1838. This letter was received, Wood being one of the firm. It was shown that the notes of the defendants were given up on transferring their interest to the intervenor. There was judgment in favor of the intervenors, and the plaintiff appealed.

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VS.
MORRIS ET AL.

A. Pierse, for the plaintiff, contended, that at the time the attachment was served, and for a few days afterwards, the boat's papers were in the name of the defendants, as part owners, at the custom-house.

2. There is no proof that Wood had accepted, or even knew of the sale to him by defendants, until after the attachment was levied. The bill of sale should have been made known, and the title of the purchaser made public immediately, to hold against the attachment. It can have no effect against third persons until its publicity.

3. There is in fact no bill of sale shown, but only a copy certified by the collector. It only proves that the original was filed in his office. It cannot prove a sale of the property; the original should be produced for that purpose.

4. But even admitting the sale to have been consummated and binding on third persons when the attachment was issued, the other party has not shown *possession*, which is necessary to pass the property. See 7 *Louisiana Reports*, 707; 4 *Martin*, 20; 3 *Idem.*, 222.

5. The transmission of the bill of sale to the firm of the claimant's partner in New-Orleans, was no delivery of it. Where was it from the 8th to the 24th April, or at the time of the attachment?

6. The claimant never signed this bill, or became a party to it or the sale. He was bound to do so, and to show some act on his part towards the completion of the sale.

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7. There is no proof that there was any consideration paid. The witnesses only swear they understood from the parties, that certain notes were to be given up. This is not explained. It was easy for the plaintiff to have done so ; and his title is, to say the least, doubtful.

8. The bill of sale is defective in not being acknowledged and registered before the clerk of the county where it was executed. See *Tennessee Laws, Session Acts of 1835-6*, page 163. It is also shown that the common law prevails in Tennessee.

Preston, contra.

Martin, J., delivered the opinion of the court.

The plaintiff attached the supposed *interest* of the defendants in the steam-boat Wm. L. Robeson.

Larkin F. Wood intervened, and showed that at the time of suing out the attachment, the defendants had executed a deed of sale, and delivery of their interest as part owners in the steam-boat, to him. There was judgment in his favor, and the plaintiff appealed.

The counsel for the plaintiff urges that a change of papers relating to the registry of the vessel at the custom-house was necessary to vest title in the purchaser, and relies on the act of Congress, passed in 1792, section 11, concerning the registering of ships and vessels.

The District Court was of a different opinion, and considered the provisions of that act were only intended to regulate the right of the new owners to documents establishing the national character of the vessel. The court in our opinion did not err.

The Registry Act of Congress passed in 1792, section 11, relating to ships and vessels, is only intended to regulate the national character of the vessel, and not to vest title in the new owner.

Among the other points raised by the appellant's counsel, one only requires our attention : It is, that the bill of sale of the defendants' *interest* in the steam-boat had not reached the intervening party at the time the attachment was served. It was enclosed by the defendants on the 24th April, 1838, at Memphis, in a letter addressed to the firm of Larkin F. Wood & Sinnott, at New-Orleans, of which the intervening

party was a member. The precise time when the letter and its enclosure was received is not shown. The attachment was served on the 28th of April following the date of this letter.

We are of opinion that the transmission of the bill of sale, followed by the actual receipt of it by the intervening party, was a delivery to him at the moment of the transmission; for the person who received it from the defendants held it for the intervening party.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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CARMENA

VS.

MIX.

The transmission of a bill of sale to the purchaser, followed by its actual receipt, is a delivery to him, at the moment of the transmission, which takes effect from its date.

CARMENA VS. MIX.

APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF
POINT COUPEE, THE JUDGE OF THE SECOND DISTRICT PRESIDING.

As soon as the ten days allowed for delay expire, after service of citation, if the court is in session, the plaintiff may take judgment by default, if there is no answer filed. See 13 *Louisiana Reports*, 471.

Where an endorser, at the maturity of the note, writes on the back of it, "I hereby waive the formality of protest and hold myself equally bound," he will not be entitled to any further notice of its dishonor.

This is an action against the endorser of a promissory note. Service of citation was made on the defendant personally, 21st May, 1839.

On the opening of court, at the June term following the commencement of suit, the plaintiff took a judgment by default. The defendant's counsel insisted that no default could be taken until the second day of the term, and moved to set it aside, and urged that no further proceedings could be

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MUNICIPALITY

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had at the present term. The court overruled the motion, and on answer filed, the cause was immediately taken up for trial.

The note sued on was produced in evidence, with the defendant's endorsement admitted, and on which he had written that he waived the formality of a protest, the very day the note became due. There was judgment for the amount of the note; and the defendant appealed.

Weems and Dalton, for the plaintiff.

Stevens, contra.

Bullard, J., delivered the opinion of the court.

The endorser of a promissory note is appellant from a judgment against him, and contends that the court erred in permitting a judgment by default to be taken, as the time allowed for answering did not expire until after the second day of the term. We have recently had occasion to express our opinion on this point. See *Maurin et al. vs. Dashiell*, 13 *Louisiana Reports*, 471. The default was well taken.

On the merits, it appears that the defendant, at the maturity of the note, wrote upon it, "I hereby waive the formality of protest and hold myself equally bound." He was not in our opinion entitled to any further notice of the dishonor of the note.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

MUNICIPALITY NO. TWO VS. GRONING ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it appears that the *principal* is released from the obligation to account for certain moneys advanced to him, his *sureties* in the obligation will be discharged.

The plaintiffs allege that the defendants become the sureties of one Doorman, to whom was advanced the sum of four hundred dollars *for work to be performed* on the Poydras Market; that the suretyship of the defendants binds them for the performance of the work, or the repayment of the money; that Doorman has not complied with the conditions on which the advance was made, and the defendants are liable for its repayment. The defendants in their answer, pleaded a general denial; but averred that Doorman had performed the work, and complied in all respects, by extra work, &c. done, with his obligation. The sureties bound themselves on the 20th July, 1838, for the sum of four hundred dollars, "the advance required from the Municipality *at that date, for work done and to be done* on the Poydras Market."

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It was admitted, in evidence, "that on the 1st August, 1838, the sum of four hundred dollars was paid to Doorman by the plaintiffs, *for work done* on the Poydras-street Market."

There was also evidence of extra work; and a bill, produced in March, 1839, approved by the city surveyor, amounting to three hundred and nineteen dollars and sixty-two cents.

The district judge was, however, of opinion that the plaintiffs made out their case, and rendered judgment for the amount claimed; from which the defendants appealed.

Rawle, attorney for the Municipality, submitted the case.

Mitchell, for the defendants, insisted that the admission in the record, showed that twelve days after the advance, a sum sufficient to cover or replace it had been made by the plaintiffs. The judgment should, therefore, be reversed.

Martin, J., delivered the opinion of the court:

The defendants are appellants from a judgment against them as sureties of one Doorman, for the sum of four hundred dollars, advanced to him by the plaintiffs on account of work done, or to be done, on the Poydras Market, on the 20th July, 1838.

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There is an admission in the record, that on the first of August following, the plaintiffs paid to Doorman four hundred dollars "*for work done on the Poydras Market.*"

If between these two dates, Doorman performed work on the Poydras Market of the value of four hundred dollars, he was thereby released from his obligation to account for the money advanced him; and the obligation of his sureties vanished with *that* of their principal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and that ours be for the defendants, with costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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The liability of corporations is the same as natural persons, for the acts and neglect of their agents, when acting within the scope of their employment. Masters and employers are responsible for the damage occasioned by their servants and overseers, in the exercise of their functions, but this liability only extends to cases where the master, or employer, might have prevented the act which caused the damage, *and did not*.

So, where a lock-keeper, instead of attending to his duties, assaults and causes damage to a passenger, even under pretext that the latter has not paid his toll, he alone is liable for the damage, and not his employers.

This is an action of damages, in which the plaintiff claims from the defendants two thousand dollars damages occasioned by one Joseph Meyer, their lock-keeper, for assaulting, beating and imprisoning him, and taking his fishing boat and its load or cargo of oysters.

The plaintiff alleges, he was returning from Barataria with his skiff or boat with oysters, on the Barataria canal, and in passing through the locks, near the Mississippi river, he was violently seized and assaulted, without cause; put in the stocks, and his boat, oysters, and other things taken from him, by a man named Joseph Meyer, in the employment of the Barataria and Lafourche Canal Co., and for whose misconduct and illegal acts said company is liable. He prays that they be condemned to pay him the damages he claims.

The defendants pleaded a general denial; and expressly averred that they were in no manner liable. It was evident from the testimony, that the plaintiff (a colored man) was violently treated by the defendant's lock-keeper, and apparently without cause. The proof went far to support the allegations.

The district judge was of opinion that the plaintiff had sustained damage to the amount of one hundred and fifty dollars, and that the defendants were liable for the acts of their servant or lock-keeper. From this judgment they appealed.

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Wills, for the plaintiff, insisted that the judgment was supported by law, and also by the evidence, and should be confirmed.

Derbigny, contra.

Morphy, J., delivered the opinion of the court :

The plaintiff claims damages to the amount of two thousand dollars, for assault and battery, false imprisonment and consequent loss of property, which he alleges to have suffered by the acts and doings of one Joseph Meyer, while in the employ of defendants, as keeper of the locks of the Barataria and Lafourche Canal Co. He sets forth that being an oyster-trader from Barataria, he arrived at the locks or sluices of the canal, on the Mississippi ; that, after being unnecessarily detained there, he was by the said lock-keeper cruelly beaten, stripped of his clothes, and put in the stocks, on a plantation near the canal, and kept in confinement for several hours ; that, all this violence or outrage was offered him under the pretext that he had not paid the toll, although the same had not been demanded of him. The answer denies the liability of defendants for the acts alleged in the petition and puts them at issue. The plaintiff obtained judgment for one hundred and fifty dollars, and defendants appealed.

The only question in the cause turns on the responsibility of defendants for such acts of their agent as are complained of.

The liability of corporations is the same as natural persons, for the acts and neglect of their agents, when acting within the scope of their employment.

A distinction has been attempted to be drawn between corporations and natural persons, as to their liability for the acts and neglects of their agents, when acting within the scope of their employment. We think that the responsibility of both exists on the same grounds, in the same manner and to the same extent ; but how is that liability regulated by our laws ? In the chapter of the Louisiana Code treating of offences and quasi-offences, we find that masters and employers are responsible for the damage occasioned by their servants and overseers in the exercise of the functions in which they are employed ; but the same article which creates this

liability restricts it to those cases where the masters or employers might have prevented the act which caused the damage, and have not done it. *Louisiana Code*, article 2299; 8 *Martin N. S.*, 503, *Palfrey vs. Kerr*; 8 *Louisiana Reports*, 538; *Strawbridge vs. Turner and Woodruff*. The plaintiff's counsel has called our attention to the case of *Rabassa vs. Orleans Navigation Company*, 5 *Louisiana Reports* 461, decisive against the defendants; but in that case the evidence showed, and the ground of the decision was, that the company had authorized the trespass, which was the subject of complaint. It is said that in most cases, the restriction in the code will do away entirely with every thing like responsibility in the master or employer, for it will seldom happen that the latter can prevent the act which causes the damage. This may be and we believe is true, but our duty is to apply the law when its letter is clear, and we could not justify a violation of its precepts on the ground of any supposed or real inconvenience and difficulty attending its application. The law, if defective, can be modified by that branch of the government whose province it is to make our laws, or amend them when experience shows their inadequacy to subserve the purposes of justice. This restriction to the liability of masters and principals was an unfortunate and unadvised departure from the Napoleon Code, from which most of the enactments of our laws on this subject have been taken almost *verbatim*. In that work, the restriction which exists in favor of fathers, teachers, &c., does not extend to masters or principals. The reasons given for this distinction is, that servants and agents, when in the discharge of their duties, are supposed to be acting under the authority of their masters and principals; and that the latter should be attentive to employ none but good servants and agents, while the restricted liability of fathers, teachers, &c., has only for its object to secure from them a proper degree of watchfulness over the conduct of the persons entrusted to their care.

But leaving out of view this restriction, the policy of which may well be questioned, it will be found we think, on examination, that in every system of laws, this liability of mas-

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Masters and employers are responsible for the damage occasioned by their servants and overseers in the exercise of their functions, but this liability only extends to cases where the masters or employers might have prevented the act which caused the damage, and did not.

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ters and principals for the acts of their servants and agents rests on the ground of express or implied authority from the master or principal. The doctrine appears to us correctly laid down by Sir William Blackstone (1 Commentary 456,) "That the master is answerable for the acts of his servant, if done by his command, either expressly given or implied." In another place (page 457) he says: "if a servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done *while he is actually employed in his master's service*, otherwise the servant shall answer for his own misbehaviour." The distinction is obvious between the wilful and deliberate acts of agents amounting to offences which they might commit, even when attending to the functions entrusted to them, and those acts of imprudence, unskillfulness and ignorance, in the discharge of their duties, which may occasion injury to others. When an agent, losing sight of the object for which he is employed, commits wrongs and thereby causes damage, the principal is no more answerable for them than any stranger; as to such wrongs, the agent must be considered as acting of his own will and not in the course of his employment, or under any implied authority of his principal. It is on this ground that it has been holden in England that a master was not liable in trespass for the wilful act of his servant in driving his master's carriage against the carriage of another, without his master's directions or assent; and this doctrine has received the sanction of the Supreme Court of Massachusetts: 1 East 106, *McMannus vs. Crickett*; 17 Massachusetts Reports 508 and 510, *Foster et al. vs. the Essex Bank*.

So, where a lock-keeper, instead of attending to his duties, assaults and causes damage to a passenger, even under pretext that the latter has not paid his toll, he alone is liable for the damage, and not his employers.

In the present case, Joseph Meyer was stationed at the Barrataria and Lafourche canal, to keep the locks, open and close them, and receive the tolls. If, instead of attending to those duties, he assaulted the plaintiff, deprived him of his liberty, and thereby occasioned to him the loss of property complained of; in doing these wilful and wicked acts, he clearly stepped out of the line of his duty to the defendants, and was not in their employment. They cannot, therefore,

be made answerable in damages on any principle of law or justice. EASTERN DIST.
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It is, therefore, ordered, that the judgment of the District Court be annulled, avoided and reversed, and that ours be for the defendants, with costs in both courts.

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Where a mortgage has been raised and cancelled under defective powers, by the attorney in fact, yet when it has been actually cancelled under them, and a direct release by the mortgagees is subsequently made, purchasers will be fully protected by it.

This court will not travel out of a bill of exceptions to notice objections which were not made in the court below. Had they been suggested there, they might have been removed.

Where a curator of an interdicted person is shown to have been regularly appointed, and has acted and been recognized by the Probate Court as exercising the office, he will be presumed to have taken the necessary oath, although none is found in the record; and his authority and acts will be deemed valid.

The oath to be taken by a curator, is an important formality not to be dispensed with; but when all the other proceedings had for the alienation of minors' or insane persons' property have been conducted with the fidelity an oath was intended to secure, purchasers will be protected under them, even if no oath be found.

This is an action of partition, instituted by the widow and administratrix of Jonathan Ball, deceased, for one undivided third part of a piece of ground situated in the Second Municipality of the city of New-Orleans, called the "Rope Walk," which was the joint property of the partners of Jonathan Ball & Co.; a firm composed of Jonathan Ball, Erastus Ball, and L. C. Ball.

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There was a sale of the property ordered to effect a partition, and N. B. Le Breton, P. A. Roste, H. F. Deblieux, and L. Janin, became the purchasers on the 9th of May, 1836, for one hundred and eight thousand dollars; one third payable in cash, and the balance in notes at six and twelve months. The property it seems originally belonged to Russell Ball, who died, leaving his father, mother, and brothers and sisters his heirs. By an act under private signature, dated the first of August, 1831, the other heirs sold their interest in this property to the firm of Jonathan Ball & Co., composed of Jonathan, Erastus, and L. C. Ball. In this sale, Lemuel Ball, the father, appeared not only as selling his own share, but also that of Clarissa Ball, his daughter, *an insane person*, and styles himself her guardian, and affirms that he is authorized to act in her name by proper authority. In this sale the vendors reserved a mortgage to secure the payment of twenty-one thousand three hundred and thirty-five dollars, with six per cent. interest; which mortgage was not raised when the sale for a partition was made. To cure the supposed defects in the authority of her father to sell her share, Clarissa Ball's brother, Erastus Ball, instituted proceedings in the Court of Probates, had her interdicted as an insane person, and was regularly appointed her curator, and had her share resold in April, 1837, which was bought in by the purchasers at the same rate which her interest bore to the original price, viz : nine thousand dollars for her twelfth part.

The purchasers still refused to comply with this sale, and to allow the notes previously deposited to be given up.

The original parties to this suit took a rule on Le Breton and the other purchasers, to show cause why they should not give up said notes and comply with the terms of sale. The defendants, in answer to the rule, denied their liability, because the plaintiffs had neglected to raise the mortgage, and to cure the defects in the title. They contended that as these defects did not affect more than one-third of the value of the property, they would only retain one-third of the price.

The rule was, however, made absolute, and the defendants therein appealed.

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Preston for the plaintiffs and appellees, insisted on the affirmance of the judgment, with costs and ten per cent. damages for the delay and injury occasioned thereby.

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L. Janin, for the appellants, contended that the mortgage was not legally raised. The appellees produced indeed a release by Erastus Ball, dated April 10, 1837, by which he raised the mortgage as the attorney in fact of the other heirs by virtue of two powers of attorney, dated the 18th and 31st of January, 1834. These powers of attorney were produced, but they do by no means authorize him to raise this mortgage.

1. He was not specially empowered to raise this or any other mortgage, and a special power is required for this purpose. *Louisiana Code* 2966.

2. The power was a general one to settle the business of *R. Ball's estate*. As regards this mortgage, Erastus Ball himself was one of the persons who owed it; he could not use the power of attorney of his constituents to release himself from a debt he owed to them. *Beal vs. M'Kiernan*, 6 *Louisiana Reports*, 415.

3. Even if he had been specially authorized to release mortgage, this release would have been invalid, for it was gratuitous in regard to his constituents, who received no consideration for it. *Paley*, 222.

4. One or all of these powers of attorney were joint and several to Erastus and L. C. Ball, one being authorized to act singly in the case of the absence or inability of the other; and L. C. Ball's absence or inability are not shown.

To remedy these obvious defects, the appellees produced at the trial a paper, of which the appellants had no previous knowledge whatever. This purports to be a release of the mortgage, under private signature, in favor of J. Ball & Co., "against a tract of land and improvements, denominated the Rope Walk," executed on September 3, 1835, and not certified.

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The hand-writing of the signers was proved by a comparison of hand-writings. The appellants took a bill of exceptions to this mode of proof. An instrument of such a suspicious character (for the debtors themselves acknowledge that the mortgage had not been paid long after its date) ought certainly not to be admitted without great caution. It is not certified; a precaution which is rarely omitted in a document executed at the North, for the purpose of being used here. It was for the first time thrust upon the appellants at the moment of the trial; it was not used in the previous attempt to raise the mortgage. Moreover, the experts did not verify the hand-writing by a comparison with the signatures of the parties to a document admitted to be genuine; but they came to the conclusion stated, because the hand-writing resembled that of the same parties to acts deposited in the office of a notary public in this city, and attested by the governors of Vermont and New York. Thus this proof was arrived at by a most circuitous route.

In some other document, the certificate of a Vermont justice of the peace attests the signatures; his own is certified by the governor; the governor's is taken for granted; and those signatures believed at second and third hand, are the guides of the experts, who decide after a hasty glance.

But the experts fortunately state the grounds of their belief; and it thus clearly appears that the evidence is not legal. They state that they have compared the document in question with others deposited in the office of W. Y. Lewis, which are duly legalized. But the originals of these "duly legalized documents" are not in evidence; and though the court was bound to recognize the signature of the governor, still it was not bound to take it for granted, upon the statement of the witnesses, that these documents were duly legalized; nor do these witnesses state in what manner those documents were legalized, and what documents they were. These original documents ought at first to have been given in evidence, and been recognized by the court as establishing the genuineness of the signatures affixed to them. Then the question would still have arisen, whether the governor cer-

tified more than the signature and official capacity of the justice, and the justice more than the acknowledgment of the signers; that acknowledgment, whether true or not, whether the names were written by those that bore them, or by others for them, would be equally binding upon them, without clearly showing that the names were written by themselves; for this is not the principal object of the acknowledgment.

Lastly, as regards the *effect* of this release, the property is described in it in a manner which is wanting in the certainty, as requisite in the cancelling as in the granting of a special mortgage. "A tract and improvements denominated the Rope Walk." What identifies this with the property mortgaged by the plaintiff, or bought by the defendants in the rule? *Louisiana Code*, 3273.

The sale by order of the Court of Probates is void, and therefore does not cure the defect in the first sale.

It was not preceded by a legal inventory. An inventory was indeed made on December 20, 1836, and Erastus Ball appeared in it as curator, but it appears from his petition of the 31st of December, 1836, in which he prays for letters of curatorship, on giving proper security, that when the inventory was made he was not duly qualified. And it appears from articles 402 and 329, of the *Louisiana Code*, that though the curator of an interdicted person, as well as the tutor of a minor, may give security after the inventory is made, still he must have been previously appointed by the court. An inventory without the presence of the curator, is a nullity.

All the proceedings in the Court of Probates are radically null; for the curator *never took an oath*. There are no letters of curatorship, no oath in the record, although it is a complete transcript of all the proceedings had, and all the documents on file. The appellants beg leave to affirm that they have lately verified that the curator never was sworn, and that the absence of his oath is not a mere omission in the transcript.

Morphy, J., delivered the opinion of the court.

Russell Ball died in New-Orleans some years ago, leaving

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among other property a tract of land in the rear of the faubourg Annunciation, called his rope-walk. His heirs at law were his father and mother, his brothers and sisters, living in the northern states. They passed a private sale of their interest in said tract of land to the mercantile firm of J. Ball & Co., in this city; said firm being composed of Jonathan Ball, Erastus Ball and Levi Ball. The firm being subsequently dissolved by the death of Jonathan Ball, his widow, Delana Ball, in her own name, and as tutrix of her minor children, brought suit for the partition of the rope-walk, against the surviving partners. At the public sale made to effect this partition, the appellants became purchasers of the property for the sum of one hundred and eight thousand dollars, payable part in cash, and the balance at certain terms of credit. The purchasers having made objections to the title, it was agreed between the parties that the sale should nevertheless be executed to them by the sheriff, that the cash should be paid immediately; but that the notes should remain deposited in the Bank of Louisiana, until the defects pointed out in the title should be cured. Those defects arose from a mortgage existing against the vendors for twenty-one thousand three hundred and thirty-five dollars, the purchase money yet due to the heirs of R. Ball; and from the informal sale to the firm of J. Ball & Co., of an undivided twelfth portion of the property which belonged to one of said heirs, Clarissa Ball, an insane person. Her interest had been conveyed by her father, Lemuel Ball, styling himself her legal guardian; but no evidence had been given of his said capacity, and none of the formalities complied with that are required by our laws for the alienation of property belonging to persons in that situation. By a subsequent agreement, the purchasers consented to retain only one-third of the price for their security, until the vendors had complied with their undertaking to perfect the title.

To cure the defects complained of, Erastus Ball instituted proceedings in the Court of Probates for the interdiction of Clarissa Ball, was appointed her curator, and had her share in this property sold, when the appellant bought it at the

same rate which her interest bore to the original price, to wit, nine thousand dollars for her twelfth. The purchasers still persisting in their refusal to allow the notes previously deposited to be delivered over to the vendors, a rule was taken on them to show cause why such delivery should not take place. The judge below made this rule absolute, and the purchasers appealed.

They have assumed in this court two grounds on which they rest their resistance to the rule taken on them.

1. That the mortgage in favor of the heirs of R. Ball has not been legally raised.

2. That no oath appears to have been taken by the curator appointed to Clarissa Ball, in the proceedings under which the sale of her property was effected.

I. On the trial of the rule below, the appellees produced a release of the mortgage of twenty-one thousand three hundred and thirty-five dollars, executed by Erastus Ball, acting under two powers of attorney of the other heirs to him. It is said that these powers did not sufficiently authorize him to raise this mortgage, and a number of defects supposed to exist in these documents have been pointed out. Admitting these powers to be liable to some of the objections urged by the appellants, yet we are of opinion that inasmuch as the mortgage has been actually raised and cancelled under them, the purchasers are fully protected by the direct release subsequently given by the mortgagees themselves to the firm of J. Ball & Co. The signatures to this last instrument not being certified in due form, were permitted by the judge below to be proved by comparison of hand-writing with other signatures of the same parties duly legalized and deposited in the archives of W. Y. Lewis, notary public. This was opposed on the ground that the signatures being expressly denied by the appellants, they should be proved by witnesses who had seen the parties write. We think the judge did not err. *Louisiana Code*, 2241. *Code of Practice*, 325. 2 *Martin*, 203. 3 *Idem.*, 359. But it is now urged in this court, that the certified papers with which these signatures were compared, were not brought into court or given in evidence;

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and that although the court were bound to recognize the signature of the governor certifying them, still they could not take it for granted, upon the statement of the witnesses or experts, that in fact these documents were duly certified. There may be something in this objection, but the bill of exceptions which we find in the record is not taken on the ground that the signatures at the notary's office were not genuine, or properly attested, but on the sole ground that the signatures to the direct release given by the heirs of Ball being denied, could only be proved by witnesses. The rule is well settled, that this court will not travel out of the bill of exceptions in order to notice objections relied on here, which were not distinctly made below and fully stated in it. Had this objection been raised in the court below, it could easily have been removed by bringing before the judge the certified documents examined by the experts.

II. The want of an oath on the part of the curator of Clarissa Ball, is the other ground relied on. It is said that this informality avoids all the proceedings in the Court of Probates under which the sale of her share in the property had taken place, and leaves the title as defective as it was before. We have carefully examined these proceedings of which a certified transcript had been given in evidence below by the appellees. They appear to be regular in every respect, except that the oath of the curator is no where mentioned in this transcript; but from this circumstance must we necessarily believe that in fact no oath has been taken? We find in the transcript that E. Ball was designated by a family meeting to be the curator of his insane sister, Clarissa Ball; that he was appointed to that office by the judge of probates; that he gave security according to law, and that throughout all the proceedings which preceded the judgment decreeing the sale, he was recognized by the Court of Probates as her curator; and acted in all these proceedings contradictorily with an attorney appointed by the judge to be her curator *ad lites*. Article 402 of the *Louisiana Code* provides that all its provisions in relation to the duties and formalities prescribed for the appointment and administration of tutors apply to the

curators of interdicted persons; and article 328 declares that tutors are to take their oath prior to their entering upon the exercise of their duties. With these provisions before us, can we believe that Erastus Ball would have been recognized and permitted to act as curator throughout all these proceedings, in the Probate Court, had he not previously taken his oath of office. The order which we find in the record for the delivery to him of letters of curatorship on the sole condition that he should give security according to law, precludes the idea that he had not already complied with all the other legal requisites, the very first of which was the taking of his oath. We must believe that the positive precepts of the law are obeyed in our courts, and all that we find in the record creates in our minds a stronger presumption that an oath has been taken by this curator, than the contrary one, which may be inferred from the absence of any mention of it in the transcript before us. The oath might have been mislaid in the Court of Probates, and if not mislaid, might have been omitted in the transcript. It should seem from the judgment under review that no question was made below as to this oath not having been taken, for the judge states it to have been admitted that the defect in the title was cured, and pronounced only on the legality of the powers under which the mortgage was raised.

In suits like the present, and all those arising under article 2535, when payment is resisted by a purchaser on the plea of a just reason to fear a disturbance by an action of mortgage or revendication, the courts are placed in the singular and somewhat awkward obligation of pronouncing on the rights of persons not before them; of deciding on difficulties which may never be raised by the only party interested; and of declaring in some manner what would be their decision in a future suit that might be brought on account of the irregularity or defect in a title which furnishes the alleged just reason to fear a disturbance. If, independent of any legal question and the inconvenience of having a title which may not be considered free from any defect, the just reason to fear a disturbance were to be judged of by the degree of probabil-

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Where a curator of an interdicted person, is shown to have been regularly appointed, and has acted, and been recognized by the Probate Court as exercising the office, he will be presumed to have taken the necessary oath, although none is found in the record; and his authority and acts will be deemed valid.

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ity of any claim being set up on account of such supposed defect, it might safely be advanced, that in this case there is not the least reason to apprehend any future disturbance. The property which in 1831 was sold by the heirs of R. Ball for twenty-one thousand three hundred and thirty-five dollars, brought, in 1836, the enormous sum of one hundred and eight thousand dollars. Thus, by the probate sale, Clarissa Ball is to receive for her share the sum of nine thousand, instead of one thousand seven hundred and seventy-eight dollars; which is the amount that she, in common with her co-heirs, would have received had her interest been legally divested by the first sale. This price, which was obtained at a time when the rage for speculation in lands knew no bounds, is of itself ample security against any claim by reason of any supposed irregularity in the sale of this insane person's interest in the property. If, in addition to this, it is considered that other natural and lawful heirs are themselves the vendors of this property, and therefore bound in warranty towards the appellants, it must be admitted that in point of fact, the latter can have no just reason to fear a disturbance. But leaving out of view the considerations of fact which in the present case render extremely improbable any disturbance on the part of Clarissa Ball or her heirs, let us examine what would be the prospect of a suit brought hereafter by them against the present purchasers or their future vendors. Could this sale be disturbed because the oath of the insane person's curator should not be found in the Court of Probates; when all the proceedings would appear to have been fairly conducted, and to have been beneficial to the interdicted person? We think not. The holders of this property, or any part of it, would successfully appeal to the decisions of this court, in which it has been adjudged that purchasers at a sale made under the decree of a court of competent jurisdiction, are not to inquire into, or be responsible for, the proceedings which preceded the decree, and are not bound to look beyond the decree itself. *Michel's Heirs vs. Michel's Curator, and others*, 11 La. Rep. 149. *Lalanne's Heirs vs. Moreau*, 13 Idem., 432.

But it is said that these decisions do not apply to a case like the present, because no oath being shown to have been taken by the curator of the interdicted person, she was not represented at all in these proceedings, and that they are as invalid and void as if they had been conducted by an utter stranger. We cannot believe that a person chosen by a family meeting of the insane, and appointed curator by a competent court, who has given security for his good administration, and has in every other respect complied with the requisites of the law, can be viewed in the light of an utter stranger, for the sole reason that he has not taken an oath, or that none can be found. The oath prescribed by law to be taken by tutors curators, executors, &c., is justly considered as an important formality not to be dispensed with. Its object no doubt was to impress these functionaries with the sacredness of the trust confided to them, and to afford additional security for their good administration; and courts should be extremely attentive in taking care that this requisite be complied with. But when proceedings are had with a view to the alienation of the property of minors, interdicted persons, or of a succession, when they have been legally conducted in every other respect, and with that fidelity that the oath was intended to secure, we can see no good reason why the above cited decisions should not apply to this as well as any other informality that might exist in the proceedings that preceded the decree ordering a sale. A contrary rule to that laid down in those decisions, would eventually operate to the injury of all minors and interdicted persons; for no one would dare to purchase their property when offered for sale, if the omission or want of proof of any of the multifarious and minute formalities prescribed for the government and administration of their concerns, could subsequently authorize a revendication of the property sold; although every substantial requisite should have been complied with, and the sale should have been decreed by a court of competent jurisdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The oath to be taken by a curator is an important formality not to be dispensed with; but when all the other proceedings had for the alienation of minor's or insane person's property, have been conducted with the fidelity an oath was intended to secure, purchasers will be protected under them, even if no oath be found.

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WOODWARD vs. DASHIELL.

WOODWARD
vs.
DASHIELL.APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF
IBERVILLE, THE JUDGE OF THE SECOND PRESIDING.

Where the third possessor of mortgaged property *assumes* to pay the original vendor, he becomes the immediate debtor of the latter, who may waive his rights upon his vendee, and proceed directly against the third possessor, without the notice required by the sixty-ninth article of the Code of Practice.

In computing the distance and notice of seizure to which the third possessor is entitled when he lives more than twenty miles from the residence of the judge granting the order of seizure, the ordinary road used for travelling is to be taken, although there may be a shorter one, but seldom travelled.

The want of an amicable demand is not sufficient ground to enjoin proceedings on an order of seizure and sale.

An injunction will not be dissolved, when the party is immediately entitled to a new one.

So, where an injunction was properly obtained, but it becomes necessary that it should be dissolved, the party ought not to be mulcted in damages.

This is in the nature of a hypothecary action. The plaintiff alleged that he had in vain demanded his debt from his vendee, (T. Lesassier) and that the defendant, who was in possession of the mortgaged property, had refused to pay it; he prayed for, and obtained an order of seizure and sale against the defendant, as third possessor. The latter made opposition, and obtained an injunction to stay the proceedings, on various grounds.

The facts show, that in February, 1835, the plaintiff sold eleven slaves to one Timoleon Lesassier, payable in three annual instalments, retaining the usual mortgage. In March, 1836, Lesassier sold the slaves to the defendant, who being informed of the mortgage reserved to the present plaintiff, *assumed* the payment of the second and third instalments of the original price, as they became due, and gave the usual mortgage. In April, 1838, the last instalment having be-

come due and remaining unpaid, the plaintiff obtained an order of seizure and sale, according to the sixty-ninth and seventyeth articles of the Code of Practice.

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The defendant, in his opposition and injunction, negatived all the facts and grounds upon which the order of seizure and sale issued, and expressly charged that he had not received sufficient notice before seizure, as the judge granting it lived more than twenty miles from his residence, and that there was, he believes, no amicable demand.

The opposition was tried summarily on the answer of the plaintiff, and the injunction was dissolved, with ten per cent. interest and twenty per centum damages, and one hundred and fifty dollars special damages. The defendant, who was plaintiff in the injunction, appealed.

R. N. and A. N. Ogden, for the plaintiff and appellee, insisted on the affirmance of the judgment.

Ives, contra, urged that the injunction was properly obtained; that there was not sufficient notice given before seizure; nor was there any amicable demand. The injunction having been rightfully obtained, could not be dissolved; and, particularly, no damages could be allowed.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment dissolving an injunction which he had obtained to stay the proceedings on an order of seizure and sale. He was in possession under a sale from the mortgage debtor, the vendee of the plaintiff; in which he assumed the payment of the mortgaged debt to the plaintiff. The injunction was obtained on the following grounds:

1. That no notice had been given to the defendant of a demand on his vendor, the original debtor, and of his neglect to pay.

2. That he was entitled to more than three days notice, before seizure, because his residence was more than twenty miles from that of the judge who granted the order.

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3. It is not stated in the plaintiff's petition and affidavit, that ten days notice had been given to the defendant previous to the institution of suit, of the non-payment of the debt by the original debtor.

4. That he thinks no amicable demand, as is required by law, was ever made on the original debtor.

Where the third possessor of mortgaged property assumes to pay the original vendor, he becomes the immediate debtor of the latter, who may waive his rights upon his vendee, and proceed directly against the third possessor without the notice required by the 69th article of the Code of Practice.

I. It is true that the defendant was a third possessor of the mortgaged property; but it is also true that he was the immediate debtor of the present plaintiff, whose vendee had stipulated in his act of sale to the defendant, that the latter should pay his mortgaged debt to the plaintiff, whose right to have the property sold did not depend on the knowledge of the defendant that his vendee had failed to pay. The assumption of the defendant rendered him the immediate debtor of the plaintiff, who, whatever might be his rights against his vendee, was not compelled to exercise them before he resorted to the defendant. The plaintiff might have had at once an order of seizure and sale; and the defendant cannot complain that by a resort to the hypothecary action, he has been enabled to withhold, for a longer period, what he owes to the plaintiff.

In computing the distance and notice of seizure to which the third possessor is entitled when he lives more than twenty miles from the residence of the judge granting the order of seizure, the ordinary road used for travelling is to be taken, although there may be a shorter one, but seldom travelled.

II. It is shown by the evidence, that by the ordinary road, the distance between the residence of the defendant and that of the judge who granted the order of seizure and sale, is about twenty-four miles, but that through a cut-off the distance is only eighteen miles. We are of opinion that the distance should be computed by the ordinary road, especially as it appears the cut-off is at times impassable. The notice of seizure was, therefore, too short by one day.

III. The remarks which have been made on the first ground taken in the defence, are equally applicable to this one.

The want of an amicable demand is not sufficient ground to enjoin proceedings on an order of seizure and sale.

IV. The defendant does not deny that an amicable demand was made on the original debtor before coming on him, but only *thinks* it was not. He cannot be relieved without proof of the facts on which his claim rests. The want of an amicable demand may entitle the party to an exemption from costs, but is not sufficient ground on which to enjoin the proceedings on an order of seizure and sale.

If the untimely seizure was absolutely void, the sheriff may be bound to restore the property thus irregularly seized, and to make a new seizure immediately. The damages to which the party may be entitled for the illegal seizure, must be sought in a direct action. All the proceedings in this case, anterior to the seizure, were correct, and are not vitiated by its being prematurely made.

The judge *a quo* correctly dissolved the injunction, as the plaintiff was entitled to a new seizure if necessary, and all the ulterior proceedings thereon.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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ON A REHEARING.

Ives, for the defendant and appellant, prayed for a rehearing.

1. It seems to be admitted there was not sufficient time or notice given by the sheriff before seizure, and consequently the injunction should be sustained for irregularity and illegality of the proceedings.

2. There is but one legal and proper way of selling property under the writ of seizure, and the sheriff was pursuing a different and unlawful course in this case. Such proceeding was properly enjoined.

3. A direct action against the sheriff for damages, is at the option of the defendant, and is merely a cumulative remedy. It cannot take away the right of injunction.

4. The damages on the dissolution were erroneous, and not sustained by evidence. They were awarded peremptorily, without proof, and under a misconstruction of the statutes of 1831.

Martin, J., delivered the opinion of the court.

We have been requested to review our judgment in this case, and it has appeared to us proper to alter and amend it.

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An injunction will not be dissolved, when the party is immediately entitled to a new one.

So, where an injunction was properly obtained, but it became necessary that it should be dissolved, the party ought not to be mulcted in damages.

The injunction was dissolved, although the party who had obtained it was, perhaps, entitled to have it sustained, because we were of opinion the remedy was worse than the evil, as a new seizure must have been immediately issued. For this purpose, and for this purpose alone, the injunction was not sustained. We have often refused to dissolve injunctions when we thought the party was immediately entitled to a new one, on the dissolution of the former, and in order to avoid expense, delay and trouble.

In the present case the injunction was dissolved, although it was properly obtained. In such cases the party should not be mulcted in damages, because the dissolution takes place for the sole purpose of avoiding unnecessary costs and delay in bringing the suit to a conclusion, and the party benefited thereby, cannot expect us to give damages; for if we were compelled to do so, we would sustain the injunction, and require him to begin anew.

Amending our former judgment in this case, it is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion ought to have been given in the court below, it is further ordered and decreed, that the injunction be dissolved with costs; those of the appeal to be borne by the appellee.

VALETTI VS. GURLIE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The law requires a *demand* of at least thirty days of the original debtor and mortgagor, whether it be his own notes or those he *assumed to pay* previously to the issuing of executory process against the third possessor of the mortgaged property.

It is not sufficient, in the executory proceeding, to show that the notes the debtor and mortgagor assumed to pay, have been protested, but that the debtor himself was in default, *thirty days before* coming on the third possessor.

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This is the case of an opposition and injunction to stay executory proceedings.

The defendant, Gurlie, was proceeding against certain lots on his mortgage, executed by Emile Barthe. The latter, on purchasing this property, acknowledged the usual mortgage in favor of his vendor, and assumed to pay two of his notes, and gave his own for the balance. He afterwards sold the same lots to Suppo de Valetti. After these notes all became due and protested more than thirty days, Gurlie took out his order of seizure and sale, against the property in the hands of Valetti, the third possessor. He made opposition expressly on the ground that Gurlie had *not* in vain demanded payment of Barthe, the original debtor and mortgagor, *thirty days before* bringing suit, and taking out his order of seizure and sale. Valetti obtained an injunction in the usual way, by giving bond and security, and stopped the executory proceeding.

The injunction was tried summarily on a rule, and dissolved with interest and damages; and the plaintiff therein appealed.

Pepin, for the plaintiff and appellant, contended that any injunction suit formed a new action, and should be tried in the ordinary way, and by jury if required. *Code of Practice*, 296, 304.

2. It is only in certain enumerated cases, and when the plaintiff does not give security, that injunctions are tried summarily. This is not one of them. *Code of Practice*, 741.

3. The thirty days previous demand of the original debtor has never been made in this case, as is required by law. *Idem.*, 69, 70.

4. The protest of the notes assumed by Barthe were protested after demand, by the notary, on the makers and endorsers. He was no party to these, and consequently no demand was ever made of him. Besides, is a demand by the

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notary of a bank to be considered sufficient for the purposes required by articles 69 and 70, of the Code of Practice? This could not be the intention of the law.

Bodin, for the appellee, insisted on the affirmance of the judgment.

Bullard, J., delivered the opinion of the court.

The appellant, a third possessor of mortgaged property, made opposition to an order of seizure and sale, on the ground that no demand had been made of the principal debtor, thirty days previously to the issuing of the process. His injunction was dissolved, with damages and costs; and he appealed.

Emile Barthe was the original mortgagor, and the debt sued for is evidenced partly by his promissory note, protested more than thirty days before the issuing of the order of seizure, and partly by notes signed by Gurlic, the appellee, and by Soniat, which Barthe had assumed to pay. Although these latter notes appear to have been duly protested for non-payment, and thus a demand shown of the makers, yet there is no evidence that payment had been demanded of Barthe, who in the act of sale had assumed to pay them. Barthe was the debtor and mortgagor, of whom the law requires a demand at least thirty days previously to the issuing of executory process against a third possessor. It does not suffice, in our opinion, to show that the plaintiff's own note, and that of Soniat, which Barthe assumed to pay, have been protested; it was incumbent on him to show that Barthe himself was in default.

The court, in our opinion, did not err in disregarding the prayer for a trial by jury. *Code of Practice*, 757. 8 *Martin*, N. S., 370.

It is, therefore, adjudged and decreed, that the judgment of the Parish Court be annulled and reversed; that the injunction be reinstated, and the case remanded for further proceedings, according to law; the appellee paying the costs of this appeal.

OGILVIE VS. FAURE.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

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FAURE.

The case was submitted on the merits; and the record being incomplete for want of all the evidence, and there being no assignment of error or bill of exceptions, the appeal was dismissed.

This case was submitted to the court on the merits, without argument. The plaintiff prayed for damages as for a frivolous appeal.

It appeared from the certificates of the clerk and judge, that the record contained all the evidence, *except the plan*, of the *locus in quo*.

The plaintiff was proceeding by order of seizure and sale against mortgaged property of the defendant, when the latter made opposition and obtained an injunction. On a summary trial, the injunction was dissolved, and the defendant appealed.

F. B. Conrad, for the plaintiff.

Rawle and Josephs, for the appellant.

Bullard, J., delivered the opinion of the court.

This case has been submitted to us without argument. It commenced with an order of seizure and sale of some lots in Greenville, upon a mortgage reserved by the vendor. Opposition was made, and an injunction obtained on the grounds, first, that a part of the lots sold to him by the plaintiff, were, in fact, public property; second, that another part were sold as batture lots, and represented as affording valuable sites for saw mills, &c.; whereas, those representations are false; third, that the plaintiff had failed to construct a rail road from the Carrollton rail road to the levee, through the town, and that certain hotels had not been erected, according to promise.

The injunction was dissolved after a trial upon the merits, and the defendant appealed.

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The record is incomplete; it appearing from the certificates of the clerk and of the judge, that all the evidence adduced on the trial below is not in the transcript; nor is there any assignment of errors, or bill of exceptions, taken by the appellant.

The appeal is, therefore, dismissed, with costs.

STATE OF LOUISIANA vs. JUDGE OF THE COMMERCIAL COURT.

ON AN APPLICATION FOR A WRIT OF MANDAMUS.

No appeal lies from proceedings had on a writ of *habeas corpus* in a criminal case, or for detention in disobedience to police regulations, and the like cases.

Civil cases are essentially those in which the defendant or party against whom relief is sought by *habeas corpus*, is a natural person or corporation, other than the State.

This case comes up on an application for a *mandamus* to compel the judge of the Commercial Court to grant an appeal from his decision, *refusing* a writ of *habeas corpus*.

The petitioner, John N. Stiles, free man of color, having been arrested and committed to prison on a warrant from the Honorable Joshua Baldwin, Recorder of the Second Municipality of the city of New-Orleans, for having *failed to leave the State of Louisiana, after having been notified to depart and forever to remain out of the same*, in contravention of "an act [of the legislature] to prevent free persons of color from entering into this state, and for other purposes; approved March 16, 1830; applied by counsel to the judge of the Commercial Court of New-Orleans, for a writ of *habeas corpus*, in order to be discharged from confinement.

His honor, *Judge Watts*, made the following order on the petition. EASTERN DIST.
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"Being of opinion that the whole subject of the colored population of the United States is, by the constitution of the United States, referred to the legislation of each separate state; and being also of opinion that the law under which the party is arrested, is therefore not opposed to the constitution of the United States, and is essentially necessary to the police and self-protection of the slave-holding states:

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"The application for a writ of *habeas corpus* is, therefore, refused."

An appeal was prayed to the Supreme Court from this decision, which was also refused; the judge of the Commercial Court not considering it an appealable case.

The petitioner then applied to this court for a writ of *mandamus*, commanding the judge *a quo* to allow the appeal.

M. M. Robinson, for the application, made the following points:

1. The writ should be granted; the decision of the judge below being one from which an appeal will lie. The proceeding by *habeas corpus* in this state, is under the provisions of the Code of Practice, articles 786, 827. It is a civil proceeding, cognizable by courts of exclusively civil jurisdiction. The proceeding by *habeas corpus* has always been regarded in England as a civil proceeding. See *Bacon's Ab.*, title *Habeas Corpus ad subjiciendum*; and *Bushell's case in Vaughan's Reports*.

2. The case of *Laverty vs. Duplessis*, 3 *Martin*, 42, is no authority against the petitioner. In that case it was determined, first, that the Supreme Court had no appellate jurisdiction; and, second, that it had no general superintending jurisdiction over the inferior courts. The question whether the proceeding by writ of *habeas corpus* was of a civil or criminal character, was not raised in that case. There is no decision in this state, or elsewhere, supporting the idea that the proceeding by *habeas corpus* is a criminal proceeding.

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3. An appeal will lie from the decision of the judge below, though there be no allegation that the matter in dispute exceeds three hundred dollars, when, from the very nature of the case, the question must involve the most important interests, and the most valuable rights of the parties; the provision of the second section of the fourth article of the constitution being intended to limit the jurisdiction of the court to cases in which, *when the matter in dispute is estimated in money*, it shall exceed three hundred dollars.

Martin, J., delivered the opinion of the court.

John N. Stiles, a free man of color, imprisoned under the "act to prevent free persons of color from entering into this state, and for other purposes, approved March 16, 1830," applied for a writ of *habeas corpus*, which was denied him, on the ground "that the subject of the colored population of the United States is, by the constitution of the United States, referred to the legislation of each separate state, and that the law under which the party is arrested, is not opposed to the constitution of the United States, and is essentially necessary to the police and self-protection of the slave-holding states." The applicant prayed an appeal from the denial of the judge to allow his writ, which was refused, and he has filed his petition in this court for a *mandamus* to the judge, commanding him to allow the appeal.

No appeal lies from proceedings had on a writ of *habeas corpus* in a criminal case, or for detention in disobedience to police regulations and the like cases.

Civil cases are essentially those in which the defendant or party against whom relief is sought by *habeas corpus*, is a natural person, or corporation, other than the State.

This case cannot be distinguished from that of *Laverty vs. Duplessis*, 3 *Martin*, 42, in which this court held that no appeal lies from proceedings had on a writ of *habeas corpus*. In that case Duplessis, the marshal of the United States, being ordered to remove alien enemies to the interior of the country, arrested Laverty, a native of Ireland, who was discharged on a *habeas corpus*. The marshal being desirous of having the case examined in this court, prayed for an appeal, which was refused. He endeavored to compel the allowance of the appeal, by a writ of *mandamus*, without success. Cases like that and the present are not, in our opinion, civil cases. Civil cases are essentially those in which the defendant, or party against whom relief is sought,

is a natural person, or corporation, other than the state. If a man sues for an *habeas corpus*, on an allegation of illegal detention of his wife, his minor child, or his ward, or that of his own person by a creditor, these and others of similar character are civil cases; not so those in which the party is detained on the charge of a crime, disobedience to police regulations, and the like. See the case of *Hyde, et al vs. Jenkins*, 6 Louisiana Reports, 427.

The *mandamus* is, therefore, refused.

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PETITPAIN vs. FREY ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An amendment in a supplemental petition, which changes the original demand, from a personal action against the *endorsers* of a note, to a real action against one of them, to make the property liable, for which the note was given, is *inadmissible*, as changing the substance or nature of the issue joined.

One of the tests for ascertaining whether the substance of a demand be changed by amending the pleadings, is to see if the matters set forth in the two demands, could have been cumulated in one action or petition.

Two inconsistent demands, exclusive of each other cannot be cumulated in the same suit: so, the defendant cannot be sued on his endorsement; and as the illegal possessor of the property for which his endorsed note was given, claimed under the vendor's privilege.

This is an action against Frederick Frey & Co., as *endorsers* of a promissory note, made to their order, by Edward Salzman, also a member of said firm. The endorsement is in blank, and the plaintiff sues as the *bona fide* holder.

The defendants expressly denied the endorsement; but admitted the name of their firm was endorsed on the note in the hand-writing of Edward Salzman, who was a member of

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the firm at the time, so far as their commercial transactions and the ordinary and usual business of said firm extended. That the note was given and endorsed in consideration of real estate purchased by said Salzman, out of the usual business of their firm, which was exclusively mercantile and alone confined to transactions in personal property. They deny that they are liable under said endorsement, and pray judgment in their favor.

After this issue was made up, the plaintiff presented a supplemental petition, reserving to himself the right of showing that the endorsement made by Salzman, of the name of the firm of F. Frey & Co., was not out of its *usual course* of business, and that the endorsement was binding on said firm; added another plea in substance, that the note in question, with others, was given for the price of valuable property purchased by Salzman in the city of New-Orleans, of L. Peirce, Esq., and that on the faith of this endorsement, and its binding effect on said firm, the lien or mortgage that would have otherwise existed on the property, was released; that Salzman paid the first note, and soon after, becoming embarrassed, transferred the property to F. Frey, his partner, and confessed judgment in favor of the firm of F. Frey & Co., for the sum of thirty thousand dollars.

The petitioner further states that he received said note for a valuable consideration, in the regular course of business and is subrogated to all the rights and privileges of the original vendor, resulting from the act of sale, &c. He concludes with a prayer that Frey be cited, and the property mentioned as forming the original consideration of the note, be declared subject to the vendor's lien and privilege, in his favor, as the *bona fide* holder of the note; and that Frey be enjoined from selling or incumbering the same, or putting it out of his possession.

This amended petition was excepted to by the defendants, on the ground that it altered and changed the substance of the plaintiff's demand, and added to his cause of action an inconsistent demand. The exception was sustained, and the plaintiff appealed.

D. Seghers, for the plaintiff and appellant.

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C. M. and F. B. Conrad, and *Lockett and Micou*, for the defendants.

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Morphy, J., delivered the opinion of the court.

This is an appeal from a decision of the inferior court, dismissing a supplemental petition of plaintiff, and dissolving an injunction previously obtained thereon. The judge was of opinion that the amendment was contrary to the original demand, and had altered its substance.

The defendants had been sued on their endorsement, on a note of seven thousand five hundred dollars, dated the 17th of December, 1836, drawn by Edward Salzman to their order. The usual averments of demand and notice were made in the petition. The defence set up was, that this endorsement was not binding on the defendant, because the note sued on had been given and endorsed by their former partner, Salzman, in consideration of a purchase of real estate; a transaction not of a mercantile character and out of the usual and legitimate course of business of their partnership, which was a commercial one.

The supplemental petition after reserving the plaintiff's right to prove that the purchase of real estate was not unusual to the firm of F. Frey & Co., and that similar endorsements for the purchase of real estate have been taken up and paid by the firm, even after Salzman had withdrawn from the partnership, proceeds to state that in 1836, Levi Peirce sold to Edward Salzman two squares of ground in the parish of Jefferson, for thirty thousand dollars; that in payment of said sum the purchaser had furnished his four promissory notes, each of seven thousand five hundred dollars, drawn to the order of, and endorsed by the defendants; all dated the 17th of December, 1836, and payable at one, two, three and four years; that in consideration of said endorsement on the notes, the vendor waived his lien or privilege, and mortgage on said two squares; that it was on the faith of the genuineness and validity of said endorsement, as binding on the firm of F. Frey & Co., and each of its members, that the lien, or

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privilege, and mortgage of vendor, were released and abandoned, which would otherwise have been reserved on the property, to secure the payment of the price. The supplemental petition further sets forth that in due course of business, the plaintiff has become the holder of the three last notes above described, and as such, has become subrogated to all the rights and privileges of the vendor, Levi Peirce. That, being subsequently embarrassed in his affairs, and with a view to his impending failure, Salzman sold unto his partner, F. Frey, all his unincumbered property, and confessed judgment in favor of the firm, for thirty thousand dollars. That the said two squares were among the property thus conveyed; and that in the notarial sale thereof, the deed of purchase from Levi Peirce, by Salzman, is recited and referred to; that, at the time of the sale of this property, no consideration was given by F. Frey, and that the latter was fully aware of and informed that it had been paid by Salzman, in notes yet outstanding, and bearing the endorsements of the commercial firm of F. Frey & Co.; that said sale was in fraud of the legal rights of the original vendor, to which the plaintiff is subrogated; and that as the consideration has failed, for which the lien and privilege were waived, and the mortgage dispensed with, the plaintiff, as assignee of the original vendor, is entitled to have the same restored, and reinstated in his favor, to secure the payment of said three notes, inasmuch as said two squares are yet in the hands of F. Frey, unsold and unincumbered. The supplemental petition concludes with a prayer, that, by the judgment to be rendered, the said two squares be declared to be subject *ab initio*, to the vendor's lien and privilege, in favor of the plaintiff, and be declared to be sold, in order to pay said notes; and, finally, that Frey be enjoined from disposing of, or incumbering said property, to plaintiff's prejudice, until the decision of the suit.

An amendment in a supplemental petition, which changes the original demand, from a personal action against

From this minute statement of the pleadings, the nature of the two demands, and the relation they stand in to each other, are rendered apparent. We do not think that the judge *quo* erred, when he considered the supplemental petition as altering the substance of the original demand. The one is a

personal action against the defendants, as the endorers of the note sued on; the other a real action, which can exist only in consequence of the invalidity of the defendant's endorsement. The object of article 419, of the Code of Practice, was to prevent new causes of action from being put in a petition which might vary and change entirely the nature of the issue joined; that the demand contained in the supplemental petition is entirely a different suit, can hardly be doubted; for should the plaintiff fail in his action against the defendants, he might still bring against Frey, this new demand; the plea of *res judicata*, could not avail the latter. One of the tests for ascertaining whether the substance of a demand is changed by an amendment, is to inquire whether the matters set forth in the two petitions, could have been cumulated in one; here they could not have stood together under article 149 of the Code of Practice. In the first demand, F. Frey & Co. are sought to be made liable, on the allegation that their endorsement is valid and binding on them. The demand set up, by way of amendment, against F. Frey, as possessor of the two squares of ground, is predicated on the hypothesis, that their endorsement is not valid or binding on them, and that, therefore, the consideration for which the vendor's lien or privilege was waived, has failed. These two demands are clearly exclusive of each other. Had they been cumulated in one petition, the defendants would have been authorized, by article 152 of the Code of Practice, to refuse pleading to the merits, until the plaintiff had made his choice as to which of the two demands he intended to proceed with. But it is said that the matters contained in the supplemental petition, grow out of the nature of the defence set up by the defendants, which the plaintiff could not anticipate. To this, it is a sufficient answer to say, that, when this plea was made, the plaintiff could have done one of two things: either admit the correctness of the position assumed by defendants, or contest it; but that they cannot do both. Here, the plaintiff, in his supplemental petition, insists on rendering defendants liable on their endorsement; and, at the same time, he admits their plea to be good, by

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the endorers of a note, to a real action against one of them, to make the property liable, for which the note was given, is inadmissible, as changing the substance or nature of the issue joined.

One of the tests for ascertaining whether the substance of a demand be changed by amending the pleadings, is to see if the matters set forth in the two demands could have been cumulated in one action or petition.

Two inconsistent demands, exclusive of each other, cannot be cumulated in the same suit. So, the defendant cannot be sued on his endorsement, and as the illegal possessor of the property for which his endorsed note was given, claimed under the vendor's privilege.

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demanding that which, according to his own doctrine, can be allowed him only in case the defendants are not held liable for their endorsement. If, from the matters set forth in his supplemental petition, the plaintiff had concluded that F. Frey had sanctioned and ratified the use made of his name, and that, at least as to him, the endorsement was binding, a different question would have been presented, upon which we express no opinion, but which would not have been inconsistent with the original demand; but, by the pleadings presented to us, the issue first joined has been entirely changed, and we are prohibited, by positive law, from sustaining such a course of proceeding.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

LANG VS. KIMBALL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Prescription is an exception which does not touch the merits; and when this exception is overruled, the party should be heard on the merits.

This is an action on a draft by the drawer, against the drawee, dated Liverpool, 23d April, 1833, payable three months after date, to the order of the drawer. It was accepted by the defendant. The drawer instituted this suit the 22d November, 1838.

The defendant pleaded his peremptory exception, founded in law, that the plaintiff's claim was prescribed.

The court ordered this exception to be transferred to the issue docket, "*being an answer to the merits.*"

A witness was called, who stated that the plaintiff gave him a draft in Liverpool, for about the amount of the present

one, and desired him to collect it; that on the 17th of November, 1838, he called on the defendant on board his ship (the Garonne), and told him he would be glad if he would pay the bill he had been owing captain Lang something over five years. Mr. Kimball replied that he would be in Liverpool this winter, and "settle with, or pay" Mr. Lang; witness not remembering whether he used the word "settle," or "pay." Witness knows the defendant has been for years past trading between different ports, and is not a resident of Louisiana.

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There was judgment against the defendant, and he appealed.

Wharton, for the appellee, urged the affirmance of the judgment.

Benjamin, contra, insisted that judgment must be reversed; there was no issue joined, or trial on the merits. Prescription is expressly classed among those exceptions which do not go to the merits. *Criminal Practice*, 345.

A judgment cannot stand when there is no issue joined, either expressly by an answer, or impliedly by a default. 7 *Martin*, N. S., 285; 8 *Idem.*, 297, 300, 338.

If we are wrong in this position, we insist that there was no testimony sufficient to deprive us of the benefit of our plea of prescription: there was but one witness who testified that he asked defendant to "pay the bill he had been owing to plaintiff over five years;" defendant replied, "that he would be in Liverpool this winter, and would settle with, or pay, Mr. Lang;" witness did not remember whether he said settle, or pay. No amount was specified; witness spoke of a bill, and the suit is on an acceptance of a bill of exchange; witness knew nothing further; and yet on this vague testimony, without specification of the sum, or nature of the claim, the district judge decided that this conversation was an acknowledgment that defendant owed plaintiff eighty-nine pounds sixteen shillings, with seven years interest, and was a waiver of prescription.

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Prescription is an exception which does not touch the merits; and when this exception is overruled, the party should be heard on the merits.

Martin, J., delivered the opinion of the court.

This is an action on a bill, or draft. The defendant pleaded prescription only. There was judgment against him for the amount of the draft, and he appealed.

His counsel complains, that the plea of prescription having been overruled, judgment was incorrectly given on the merits, and that he ought to have been permitted to answer.

The court, in our opinion, erred. Prescription is an exception which does not touch the merits of the cause. *Code of Practice*, 345.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that this case be remanded for further proceedings, according to law; the plaintiff and appellee paying the costs of the appeal.

FISKE VS. FLEMING'S SYNDIC.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In order to constitute a sale *per aversionem*, there must be certain limits or boundaries given, or a distinct and separate object described, as a field inclosed, or an island.

Where a tract of land is sold, with no boundaries or limits, except as fronting on the river, and described as having eight arpents front, *forming about nine hundred and eighty superficial arpents*, with an incomplete double concession, and it is afterwards ascertained to contain *less*, the purchaser must have the difference in price, in proportion to the diminution in quantity, refunded.

The purchaser at an auction sale, looks for a description of the thing sold, principally to the *procès verbal* of the auctioneer, or act of sale, rather than to title deeds delivered, furnishing evidence of title.

The admission of an agent, accepting a sale, that the title-deeds to the property were furnished, does not amount to an exemption from warranty, on the part of the vendor, *as to the quantity* of land set forth in the act of sale.

This is an action for a diminution and refunding of part of the price of a tract of land, on account of a diminution of quantity. EASTERN DIST.
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The plaintiff shows, that at an auction sale, by the syndic of the creditors of John Fleming, f. m. c., in 1834, he purchased a sugar plantation, situated in the parish of Iberville, described in the *procès verbal* of the auctioneer, as having "eight arpents front on the Mississippi river, forming about nine hundred and eighty superficial arpents, &c.," and which was adjudicated to him for the sum of nineteen thousand three hundred dollars. He further shows, that since his purchase he has ascertained that it contains only about six hundred and twenty superficial arpents, and that this deficiency in the quantity diminishes the value in a greater proportion than that of price, because it renders his plantation too small for the profitable culture of sugar, and that he has sustained damage to the amount of seven thousand five hundred dollars, which he is entitled to claim in a reduction of the price to that extent: and, having paid the price, he prays that this sum be refunded, and that the syndic be required to retain it out of the price of the plantation, and that he have judgment for this sum.

The defendant averred, that the plaintiff knew well the contents of the plantation in question, before he received the act of sale, and paid the price, and was informed, if he was dissatisfied with his purchase, he need not take the property, and the sale would be annulled; and that the land and plantation was sold with *metes and bounds*, by order of court, to pay the debts of the insolvent, and that the plaintiff has no right of action.

Upon these pleadings and issues, the cause was tried. The *procès verbal* of the auctioneer, title and act of sale, were all in evidence; also, a plat and survey of the land, by which it appeared the actual quantity was six hundred and twenty 73-100 superficial arpents of Paris.

The cause was submitted to a jury, who returned a verdict for the plaintiff, of three thousand dollars, and the court being

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satisfied with the verdict, gave judgment accordingly, from which the defendants appealed.

Ives and *J. Slidell*, for the plaintiff, insisted that the sale of the plantation and land in question was made by the quantity, and that it was not a sale *per aversionem*.

Hennen, *Roselius* and *Pichot*, for the defendant and appellant, urged that the sale was made by metes and bounds; was a distinct tract of land, with a defined front, and cultivated and known as a sugar plantation; and that, consequently, it was a sale *per aversionem*, in which the purchaser could claim no diminution or reduction of price.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges, that he purchased, at a public sale, provoked by the defendant, as syndic of the creditors of one Fleming, a tract of land belonging to the insolvent, described as having a superficies of nine hundred and eighty arpents, with an incomplete second concession; that he complied with the conditions of the adjudication, but he finds that the plantation thus purchased, contains only about six hundred and twenty-nine arpents, instead of the quantity warranted. This suit is brought to recover back a part of the price, proportioned to the deficiency of land.

The plaintiff having a judgment in his favor, based upon the verdict of a jury, the defendant appealed. His counsel relies in this court, upon the ground that the sale was *per aversionem*, and that, according to article 2471 of the Louisiana Code: "there can be neither increase nor diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements and sold from boundary to boundary." He refers us to numerous adjudged cases, in which the above recited article has received an interpretation from this court.

The description of the tract of land in question as given in the notarial act of sale, is as follows: "Une habitation située dans la paroisse, &c., ayant huit arpens de face, formant

In order to constitute a sale *per aversionem*, there must be certain limits or boundaries given, or a distinct and separate object described, as a field inclosed, or an island.

Where a tract of land is sold with no bounda-

environ neuf cent quatre-vingt arpens de superficie, avec une double concession incomplète, &c. La dite habitation se composant de diverses portions de terres, acquises par Jean Fleming de diverses personnes, dont les titres, au nombre de cinq, ont été remis à M. Desaulles, &c." The *procès verbal* of the auctioneer gives the same description.

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None of the cases relied on by the appellant appear to us to support him. It results from all those adjudicated cases that, to constitute a sale *per aversionem*, there must be certain limits or boundaries given, or a distinct or separate object described, as a field inclosed, or an island; because it is presumed that the parties had their attention fixed, rather upon the boundaries than the enumeration of quantity. But in the case now before us no boundaries or limits are given, except in front. The tract is described as having eight arpents front, forming about nine hundred and eighty superficial arpents, with an incomplete double concession; no particular depth is given, nor the degree of divergence of the side lines necessary, with such a front, to give such a superficies. Indeed, it is difficult to imagine a more vague and unsatisfactory description. It does not even afford sufficient data to enable a surveyor to make a diagram; and it turns out in proof, that the front is not truly given, it being less than eight arpents.

ries or limits, except as fronting on the river, and described as having eight arpents front, forming about nine hundred and eighty superficial arpents, with an incomplete double concession, and it is afterwards ascertained to contain less, the purchaser must have the difference in price, in proportion to the diminution in quantity refunded.

The purchaser at an auction sale, looks for a description of the thing sold, principally to the *procès verbal* of the auctioneer or act of sale, rather than to title deeds delivered, furnishing evidence of title.

But it is contended that the purchaser was furnished with all the title-deeds to the property, and admits in the act of sale that he has received them, and thus had notice of the extent of the land really sold. An agent, who appears to have accepted the notarial act of sale, admits, it is true, that those deeds have been delivered to him, and so far as we can understand an imperfect copy on record, nothing else is admitted. We are to look principally for the description of the thing sold, to the *procès verbal* of the auctioneer, or to the act which evidences the contract afterwards, rather than to title deeds delivered, principally, if not wholly, as furnishing evidence of title to the thing sold; we are not prepared to say that such an admission by an agent, amounts to an exemp-

The admission of an agent, accepting a sale, that the title deeds to the property were furnished, does not amount to an exemption from warranty on the part of the vendor, as to the quantity of land set forth in the act of sale.

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tion from warranty, as to the quantity of land set forth in the act of sale.

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It is, therefore, ordered, and decreed, that the judgment of the Parish Court be affirmed, with costs.

M'MASTER AND HYDE vs. BRANDER ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An offer to deliver a box of goods, after suit is commenced, without tendering the costs, does not possess the requisites of a legal tender. The plea of the general issue, and an averment that a certain case of goods, described in the petition, was tendered and delivered, does not admit their value as alleged by the plaintiff, and dispense with proof of it.

This is an action to recover the sum of one thousand three hundred and fifty dollars, the *estimated* value of a case of goods shipped by one of the plaintiffs, in New-York, for New-Orleans, on board the ship Harkaway, belonging to the defendants, and not delivered according to the bill of lading.

The plaintiffs expressly allege that they are the owners of said box of merchandise, (describing it;) that it contains sixty pieces and eighteen yards of printed muslins, worth one thousand three hundred and fifty dollars, according to a detailed account annexed, which was shipped with other goods of theirs, on board said vessel, and not delivered; and that the defendants are liable to pay its value as above stated, for which they pray judgment, and that said ship be attached.

The defendants pleaded a general denial, and expressly denied any liability. They further aver, that the *case of goods* described in the plaintiffs' petition was duly delivered, and

was tendered to the plaintiffs, who refused to receive it. They pray for general relief, and to be dismissed.

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Upon these pleadings and issues, the cause was tried before the court.

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The evidence showed that the case of goods was shipped in New-York, the 20th February, 1837; and that on the 20th of May following, about a month after this suit was instituted, the captain and consignees of the ship offered to deliver the goods in question, and one of the plaintiffs being present, agreed to take them, but on condition that he would still hold the ship liable for damages. The delivery was declined on these terms.

There was no evidence of the value of the goods, except in the account made out by plaintiffs, and set out in the petition. The evidence principally went to show that there had been some delay in the delivery of this case or box, not accounted for; and that by the advance of the season, the goods had greatly depreciated in value.

The district judge was, however, of opinion, that as the pleadings admitted the identity and description of the box of goods, that their value was also acquiesced in; and that the defendants had not made such a tender as would exonerate them and put the plaintiffs in default. Judgment was given for the amount claimed, and the defendants appealed.

Lockett, for the plaintiffs, insisted that the judgment was correct, and should be affirmed.

Roselius, for the appellants, contended:

1. The case of goods, for the non-delivery of which this suit is brought, was tendered to the plaintiffs, before the answer was filed, in presence of three witnesses. If the costs accrued were not offered, the only effect of this is, that the defendants are not exonerated from the payment of the costs subsequently incurred.

2. The defendants were never put *in mora*, no demand for the delivery of the goods was ever made before the institution of the suit.

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3. There is no evidence of the value of the goods; but the judge of the court below very illegally concludes that as we aver having tendered the case of goods claimed, we thereby admit its value. This is a *non sequitur*.

Morphy, J., delivered the opinion of the court.

This is an action to recover one thousand three hundred and fifty dollars, the value of a case of goods put on board the ship *Harkaway*, in New-York, and consigned to the plaintiffs here, but not delivered to them on the arrival of the ship at this port. The defendants, after a general denial of all the allegations tending to make them liable to plaintiffs, aver that the case of goods described in the petition, was duly delivered and has been tendered to the plaintiffs, who have refused to receive it. The plaintiffs obtained, in the inferior court, a judgment; from which defendants prosecute this appeal.

The evidence shows, that about a month after the institution of this suit, defendants made to plaintiffs an offer of the case of goods claimed of them, which through some mistake or accident, appears to have been mislaid. The plaintiffs refused to receive the goods, unless under an express reservation of their right of holding the defendants liable in damages for their tardy delivery. These terms not being agreed to by defendants, the goods were not delivered. It is useless to inquire into the plaintiffs' right to make any such reservation, under the averments of their petition; for the offer itself, independent of this pretension of plaintiffs, was not accompanied with a tender of the costs incurred up to that time, and did not possess the legal requisites of a tender, according to articles 404 and 407, of the Code of Practice. No proof whatever was given below of the value of the goods claimed. We cannot agree with the judge who tried this cause, that this was unnecessary under the pleadings; that defendants, by averring that they had tendered the case of goods described in the petition, thereby admitted and acquiesced in the value affixed to the goods by plaintiffs. The words used by defendants clearly related to the marks and other particulars, by

An offer to deliver a box of goods, after suit is commenced, without tendering the costs, does not possess the requisites of a legal tender.

The plea of the general issue and an averment, that a certain case of goods described in the petition, was tendered and delivered, does not admit the value of the goods as alleged, by the plaintiff, and dispense with proof of the value affixed by him.

which the box, by them tendered, could be identified with that mentioned in the petition. The price which it pleased plaintiffs to affix to the goods, could not have entered the minds of defendants, when they made this averment. The plaintiffs cannot recover without proving the value of the goods for which they seek to render defendants liable. We think, however, that the justice of the case requires that they should be afforded an opportunity of making such proof, which they thought perhaps unnecessary.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded for further proceedings; the plaintiffs and appellees paying the costs of this appeal.

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**PERRET & GALLY VS. KEILL ET AL.; NICOLET'S EXECUTORS,
GARNISHEES.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Without an answer filed, or judgment by default, no reference, or order of submission to arbitrators, can be made in a cause; and such a submission may be assigned as error.

Where there is no *contestatio litis*, or judgment by default, all the subsequent proceedings are irregular and void.

This suit commenced by attachment. The plaintiffs allege that they purchased, and shipped, by agreement, a large quantity of cotton to the defendants: one-third to their house in Liverpool, trading under the firm of Keill & Courant; one-third to the house of F. Courant & Co., in Havre; and one-third on their own account; and drew bills on said shipment, which the defendants were to accept and pay;

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but which were refused acceptance, and protested for non-payment. The plaintiffs further allege, that there is considerable loss on said cotton, and that the defendants are bound for two-thirds thereof : at least fifteen thousand dollars. They pray judgment for said sum, or such other and larger one as may be found due ; and that property of the defendants, in the hands of Theodore Nicolet, and of Livaudais, Charbonnet & Co., may be attached to satisfy said judgment.

An attorney was appointed to the absent defendants, and the attachment discontinued as to F. Courant & Co. The attorney was allowed six months to correspond with, and file the answer of the defendants. In the mean time, the plaintiffs' counsel obtained an order referring the case to auditors, to make up and state an account and balance, and report the same to court. The auditors reported a balance of nine thousand seven hundred and eighty-three dollars due to the plaintiffs, which report, on motion, and giving the usual notice, was homologated without opposition, and made the judgment of the court.

There was no answer in, or judgment by default. The plaintiffs now took a rule on the executors of Nicolet, cited as garnishees, to show cause why they should not pay the amount of plaintiff's judgment against the defendants, from the funds attached in their hands. The rule was made absolute, and the defendants, Keill & Courant, appealed.

Eustis, for the appellants, assigned for error the following grounds :

1. There is no cause of action set forth in the plaintiffs' petition.
2. After the discontinuance of the attachment as to Francis Courant & Co., no further proceedings could be lawfully had in the suit, for want of proper parties. See the case of the Mayor of New-Orleans vs. Ripley & others, 5 *Louisiana Reports*, 120 ; *Louisiana Code*, article 2080, *et seq.*
3. The parties to the contract declared on, other than the defendants, ought to have been represented under an appointment by the court : *Louisiana Code*, 3522 ; *Code of Practice*, 116, and *art. cit.*

4. Neither the reference to arbitrators or auditors, nor the award, embraced the subject matter of the plaintiffs' demand.

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5. No answer was filed in behalf of the defendants, and no judgment by default was taken against them; no reference or arbitration could be had in the cause, until issue joined between the parties.

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6. The judgment rendered in the award is illegal, both in form and substance, for causes apparent therein, and the proceedings had touching the same.

For these, and other causes apparent on the record, the appellents pray that the judgment appealed from may be reversed.

Lockett, for the plaintiff, insisted on the affirmance of the judgment.

Morphy, J., delivered the opinion of the court.

This suit commenced by attachment. The petitioners state that pursuant to previous arrangements, they purchased and shipped for Europe a large quantity of cotton: one-third for account of Keill & Courant, a mercantile firm trading in Liverpool; one-third for account of Francis Courant & Co., trading in Havre; and one-third for their own account. That by agreement among the parties, they were to draw bills of exchange against said shipments, upon the aforesaid firms, who were to accept and pay the same; that they did accordingly draw on said firms for the price of the cotton they forwarded to them, but that on the presentation of said bills, the firms of Keill & Courant, and F. Courant & Co., refused to accept them, and said that they would not pay their amount at maturity, although said firms had received said shipments of cotton. The petitioners further aver, that from all the information they have received, they verily believe there is or will be a loss on said cotton of fifty thousand dollars, or thereabouts; and that for two-thirds of said sum, the firms aforesaid are bound and liable to them. An attorney was appointed to represent the absent defendants, who does not appear to have filed any answer to the plaintiffs' petition. Notwith-

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standing this, the petitioners proceeded to have auditors appointed, on the ground that there were long and intricate accounts between the parties to be investigated. Four days after taking their oath, we find the auditors reporting the accounts submitted to them by plaintiffs, as correct, and conformable to commercial rules, and stating that they believe, *to the best of their knowledge*, that the sum of nine thousand seven hundred and eighty-three dollars and seventy-eight cents (the balance of the accounts current presented by plaintiffs,) is due them by Keill & Courant. As to F. Courant & Co., the attachment appears to have been discontinued by the plaintiffs, before the reference to auditors had been ordered. No opposition having been made to this report, it was homologated; and on a rule taken on the garnishees, the latter were decreed to pay over to plaintiffs the funds attached in their hands, to an amount sufficient to satisfy their claim. It is from both these decrees that the present appeal has been taken. The loose and irregular manner in which all these proceedings have been carried on, has enabled the appellants to place their case before us on a long assignment of error, apparent on the face of the record.

Without an answer filed, or judgment by default, no reference, or order of submission to arbitrators can be made in a cause; and such a submission may be assigned as error.

Where there is no *contestatio litis*, or judgment by default, all the subsequent proceedings are irregular and void.

We shall not notice all the grounds assumed, although several appear to us well founded, because the view we have taken of one, renders this unnecessary. It is assigned, that no answer having been filed, no reference or arbitration could be had in the cause. This we think is fatal. Without a *contestatio litis*, in a judgment by default, all subsequent proceedings must be considered as irregular and void. The petition itself is so vague and insufficient, in setting forth the indebtedness of the defendants, that it might with propriety have been dismissed; but as on a new trial it might be amended, we have thought it best to remand the case for further proceedings.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court appealed from be annulled, avoided and reversed; and that this case be remanded to said court, to be proceeded in according to law; the plaintiffs and appellees paying the costs of this appeal.

MILLAUDON VS. COLLA.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

MILLAUDON
vs.
COLLA.

The holder of a note who endorses it in blank, gets it discounted and takes it up at maturity, is subrogated to the rights of the bank against the maker.

Payment to a bank, like that to an individual, may be proved by parole evidence.

This is an action against the maker of a promissory note, payable to the order of A. Lesseps, and by him endorsed in blank. The plaintiff endorsed it to the Union Bank for discount, and at maturity took it up. It was receipted across the face as follows: "Received payment of L. Millaudon; A. Bouligny, note clerk."

The defendant strenuously insisted that the plaintiff did not show an interest and re-transfer of the note by proper legal evidence, under the corporate seal of the bank, and was not entitled to recover. There was judgment against him, and he appealed.

Benjamin, for the plaintiff, urged the affirmance of the judgment, with damages.

Mitchell, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment against him, for the amount of his promissory note. He admitted his signature, but denied specially the allegations in the petition.

The note was made payable to the order of A. Lesseps, and by him endorsed in blank. The plaintiff made a special endorsement to the Union Bank. On the face of the note there is a receipt in these words: "Received payment of L. Millaudon; A. Bouligny, note clerk."

The attention of this court is called to a bill of exception, upon which the appellant has based his hopes of success.

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SAVENAT ET AL.

On the trial, a witness was sworn, who stated that the plaintiff had paid the amount of the note to the bank; whereupon the counsel for the defendant moved the court to charge the jury, that the plaintiff could not recover without showing, by written evidence from the bank, under its seal, that the interest of the bank had been conveyed to the plaintiff; and this not being shown, he should be non-suited. The court refused so to charge the jury; and the defendant excepted.

The holder of a note who endorses it in blank, gets it discounted, and takes it up at maturity, is subrogated to the rights of the bank against the maker.

Payment to a bank, like that to an individual, may be proved by parole evidence.

It does not appear to us that the court erred. The plaintiff being bound with the defendant for the payment of the note to the bank, paid it, as appears from the testimony of a witness, and the receipt of the note clerk of the bank on the face of the note; and was thereby legally subrogated to the rights of the bank. *Louisiana Code, article 2157, No. 3.* Payment to a bank, like that to an individual, may be proved by parole, or otherwise, without the seal of the corporation.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs and ten per cent. damages, for a frivolous appeal.

DELERY ET UX. VS. SAVENAT ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Appellees not cited, and the record not containing all the evidence, the appeal was dismissed.

The plaintiffs instituted an action of nullity, and obtained a judgment annulling the former judgment which had been rendered against them, concerning a house and lot. The present defendants took an appeal. The citations were issued

to the parish of Orleans, instead of the parish of Plaquemine, where the appellees resided, and were never served. The certificate of the clerk states the *verbal evidence* is not in the record. In this manner the case came before this court.

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FORSYTH
VS.
DESPIERRIS'S
EXECUTORS.

Roselius, for the appellees, moved to dismiss the appeal on account of the irregularities and defects in bringing it up.

Morphy, J., delivered the opinion of the court.

This is an appeal from a decree pronouncing the nullity of a previous judgment, obtained by defendants against the present plaintiffs, for the recovery of a lot of ground in the suburb St. Mary. From the return of the citation of appeal, which had been directed to the sheriff of the parish of Orleans, it appears that the appellees, who are residents of the parish of Plaquemine, have never been cited; but even had they been regularly brought into this court, we are not enabled to review this case on its merits, because the record does not contain the evidence on which it was tried in the inferior court.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, with costs.

FORSYTH VS. DESPIERRIS'S EXECUTORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the witnesses are of equal credibility, and differ in their testimony, the one having the best opportunity to know the facts testified to, will be entitled to the most weight.

This is a redhibitory action for the rescission of the sale and return of the price of a slave, purchased by the plaintiff at the executors' sale of the late Guillaume Despierris's succession.

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The defendants pleaded a general denial, and expressly averred that the slave was perfectly sound at the time of the sale. They pray that the plaintiff's demand be rejected, and that they have judgment for the balance of the price unpaid.

The evidence showed that the slave in question was purchased on the 12th September, 1837, and on the 30th, eighteen days afterwards, was admitted into Dr. Luzenberg's hospital, sick. He died on the 18th October following. On a *post mortem* examination, Dr. Luzenberg gave it as his decided opinion, that the disease of which the slave died had its origin and existed before the sale, and that it was incurable. Another physician, who had attended the negro about fifteen days before the sale, stated that he had had an attack of pleurisy, and was sick eight days; but that he left him, fifteen days before the sale, "*bien portant*;" that he was not afflicted with the disease stated by Dr. Luzenberg.

On this testimony, the district judge was of opinion, that more credit was due to the declaration of the physician who made the *post mortem* examination, than the other. There was judgment rescinding the sale, &c., and the defendants appealed.

Rawle, for the plaintiff.

Canon, contra.

Morphy, J., delivered the opinion of the court.

This is a suit brought for the rescission of the sale of a slave, adjudicated to the plaintiff on the ground that at the time of the sale, he was affected with a disease of which he died shortly after. The evidence shows that eighteen days after the adjudication, the slave being sick, was admitted into the infirmary of Dr. Luzenberg, where he died on the 18th of October following. A *post mortem* examination of the body of the slave, made by the physician who attended him during his last illness, convinced the latter that the disease of which this boy died must have existed, and did exist, previous to the day of the sale; and that even at that period, it was already incurable. This testimony is contradicted, in some

particulars, by another physician; but we think with the judge below, that more weight must be given to the opinion of the physician who attended the patient and made a *post mortem* inspection of his body. From the extent of the internal ravages of the disease, he was better enabled to form an opinion of its duration and real character, than the other physician, who, although he had seen and attended the boy shortly before the sale, could speak only from conjecture as to what happened afterwards, in relation to the disease of which the negro died, and the state in which his body was found.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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M'KEAN
vs.
CHASE.

M'KEAN vs. CHASE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A frivolous appeal and judgment affirmed, with ten per cent. damages.

This is an action against the endorser of a promissory note. The defendant pleaded a general denial, and want of amicable demand. The plaintiff proved his demand, and had judgment. Nothing was shown or proved in the defence. The defendant appealed.

Roselius, for the plaintiff.

Shepard, contra.

Bullard, J., delivered the opinion of the court.

The appellant being the endorser of a promissory note, was adjudged to pay the same, upon full evidence of his liability. His appeal is evidently frivolous.

The judgment is, therefore, affirmed, with costs and ten per cent. damages.

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PEIRCE vs. M'MAHAN ET AL.

PEIRCE
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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-
ORLEANS.

The vendor cannot be aware that the property he sells is purchased for speculation, and with the view to immediate re-sale; and the vendee will not be allowed to set up as error in the motive, the fact that a tacit mortgage existed on the property, which was fraudulently concealed from him, in avoidance or rescission of the sale.

Where the tutor observes all the forms required by the act of 1830, authorizing a special mortgage to be substituted in lieu of the general one resulting from the tutorship, it frees the other property from all incumbrance, and a purchaser cannot set it up in avoidance of the sale.

This is an action for the rescission of a sale of certain town lots.

The plaintiff shows, that in December, 1836, he purchased three lots from the late Doctor M'Mahan, for ten thousand dollars, payable in one, two and three years, for which he gave his notes endorsed. He further shows, that he has since discovered that there exists a tacit mortgage on said property in favor of the children of the widow M'Mahan, by a former marriage, for a large amount resulting from the tutorship. He prays that all proceedings to coerce payment of his notes, be stayed, and that they be sequestered and given up, and that the sale be rescinded and cancelled.

The defendant denied that any mortgage or other incumbrance existed on the property, or that there was any legal cause to rescind the sale.

In a supplemental answer, the defendant avers that she has settled the succession of her first husband since the institution of this suit, and has raised all tacit and general mortgages which may have resulted from her tutorship of her minor children, and also against her late husband as co-tutor.

A record of the proceedings in the Probate Court, giving a special mortgage, and raising and cancelling the tacit or

legal mortgage in favor of her minor children, resulting from her tutorship, was produced by the defendant. The proceedings were had in conformity with the act of 1830, relating to tutors of minors, and authorizing them to give special mortgages in lieu of the general ones.

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VS.
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The parish judge was of opinion there was no legal cause for setting aside the sale, and gave judgement for the defendant. The plaintiff appealed.

Hoffman, for the plaintiff and appellee, insisted that the judgment was correct; that the plaintiff had a good and legal title to the property, and any incumbrance that might result from tacit or general mortgage, was removed, and no objections could be made to the title, much less was there any cause for rescinding the sale. See case of *Denis vs. Clague's Syndics*, 7 *Martin, N. S.*, 96.

The formalities required by law in relation to the proceedings in the Probate Court, have been complied with, in raising the general mortgage and giving a special one. The judgment of the Probate Court is conclusive on this subject. *Casanova's Heirs vs. Avegno*, 9 *Louisiana Reports*, 196.

Peirce, in propria persona, contended that he purchased in error, supposing the property was clear of mortgage, and the information which would have destroyed this error, was withheld by the vendor. It comes under the head of fraud, and invalidates the contract. *Louisiana Code*, 1826, 1841.

2. This error must be on a material part of the contract, and such as may be reasonably presumed would have influenced the party in making it, or prevented him, had he known it. It need not, however, be the principal cause of the contract.

3. He bought the property, supposing it free from mortgage, and with a view of reselling. The existence of a general mortgage prevented this, and which has occasioned loss. In the words "loss or inconvenience," which may be suffered by the party, is included the preventing him from obtaining any gain or advantage. He insisted that this was a case for the rescission of the sale, on account of an incumbrance which

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April 1840. the plaintiff were applicable to it.

PRINCE
VS.
M'MAHAN ET AL.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to rescind a contract of sale of certain city lots, made to him by the late Dr. M'Mahan, on the ground that the same were incumbered by a tacit mortgage in favor of a minor, of whom the vendor was co-tutor, he having married the mother of said minor. The existence of the legal mortgage at the time of the sale, and at the institution of the suit, is not contested; but the defendant denies that it affords any legal ground for annulling the sale; and, by a subsequent answer it is averred, that since the suit was brought, the mortgage has been cancelled and erased. It is shown that the defendant, who is the surviving tutrix of her minor child by her first marriage, and duly appointed to administer on the estate of Dr. M'Mahan, her last husband, had proceeded to liquidate the claim of said minor against her and the estate of her late co-tutor, and had given a special mortgage in lieu of the general one, to secure his rights, and had procured a decree of the Court of Probates, cancelling said legal mortgage in pursuance of the act of 1830, entitled "an act in addition to the laws now in force relative to the tutors and curators of minors."

The Parish Court gave judgment in favor of the defendant, and the plaintiff appealed.

In his argument addressed to this court, he relies on two points: 1st. That the contract was null on account of error; and 2d. That the proceedings in, the Court of Probates are irregular, and do not validly release the property from the incumbrance of which he complains.

I. It is contended that the plaintiff purchased with a view to sell again; with a full warranty and a clear certificate; that the vendor must have known that the purchase was not made with a view to a permanent investment; and that if he had known of the existence of the incumbrance, he would not have purchased; and that there was such a suppression of material circumstances, as to vitiate the contract.

This argument resolves itself into the proposition, that either there was that kind of error in the principal cause or motive, that consideration without which the contract would not have been made, and which, consequently, invalidates it; or, that there was in fact fraud in not communicating to the purchaser the existence of the legal mortgage. The plaintiff alleges that he purchased with a view to speculation; that such was the motive which influenced his will, and determined him to enter into the contract; and he finds that he cannot honestly carry out his intention, having discovered the existence of a tacit mortgage on the property. The Code lays down very precise doctrines on this subject. "No error," says *article 1820*, "in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless, from the nature of the transaction, it must be presumed that he knew it." The motive, in this case, is not apparent; nor does it appear that the vendor was aware that the purchase was made merely for speculation, and with a view to immediate resale. Nor are we prepared to say that the existence of a tacit mortgage, bearing upon the property sold, in common with all the real estate of the vendor, and not disclosed at the time of the contract, affords sufficient grounds for rescission, without proof of a fraudulent concealment or suppression of the truth. The vendee could not be compelled to pay the price without security to make good the warranty, and thereby may protect himself from ultimate loss. Not only was all the property of the vendor subjected to the same mortgage, but also the property of his co-tutor, who was, at the same time, personally responsible to her ward. The risk of eviction was thereby greatly diminished; and the ability of the vendor, and the willingness of his legal representatives to remove the obstacle, are abundantly shown.

II. In deciding upon the second point made by the appellant, we cannot better express our views than by supposing that the minor, having attained the age of majority, was now seeking to enforce his legal mortgage upon the property in question, and that he was to urge the same objections to the

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The vendor cannot be aware that the property he sells is purchased for speculation and with the view to immediate resale; and the vendee will not be allowed to set up as error in the motive, the fact that a tacit mortgage existed on the property, which was fraudulently concealed from him in avoidance or rescission of the sale.

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PESCHIER
vs.
HUIE.

Where the tutor observes all the forms required by the act of 1830, authorizing a special mortgage to be substituted in lieu of the general one, resulting from the tutorship, it frees the other property from all incumbrance, and a purchaser cannot set it up in avoidance of the sale.

validity of the proceedings, which are now relied upon by the appellant, he might be answered, that by a judgment of a competent tribunal, in a proceeding in which he was duly represented by his under tutors, the general tacit mortgage had been waived, and a special one substituted in its place. Whether we regard that as a contract or a judicial proceeding, it is equally conclusive upon the minor, all the forms required by the act of 1830 having been observed, under the personal responsibility of the under tutors. That act expressly renders the under tutors liable, personally, to the minor, in case of the insufficiency of the new security, unless he makes opposition, and his opposition is overruled. *Act of 1830, sections 4 and 5.* Such a case would, indeed, differ from that of *Casanova's Heirs vs. Avego*, 9 *La. Reports*, 192, in which the property in dispute was acquired under the faith of the proceedings in the Court of Probates; while, in this, the proceedings took place principally with a view to exonerate from the general tacit mortgage, the property already acquired from a tutor: but, in principle, they are the same. The present appellant could not invoke in vain the judgment of the Court of Probates, to which the minor was regularly a party, and which would stand in the way of his original mortgage upon the lots in question.

The judgment of the Parish Court is, therefore, affirmed, with costs.

PESCHIER vs. HUIE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Damages given as a delay case.

This is an action against the payee and first endorser of a promissory note. He admits his signature, and denies every other allegation, but made no defence. The case was submitted to a jury who returned a verdict against the defendant, from which he took a suspensive appeal.

F. B. Conrad, for the plaintiff.

Sterrett, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment against him as endorser of a promissory note. He did not deny his endorsement; and there was evidence of protest and due notice. The jury returned a verdict against him. He has made no defence in this court. The appellee has prayed for damages as for a frivolous appeal, and is clearly entitled to them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed with ten per cent. damages on the amount of the judgment, and costs in both courts.

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WALLACE ET AL.
VS.
GWIN.

WALLACE ET AL. VS. GWIN.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The law is well settled, *that a presentment for payment*, at the place where a note is made payable, must be made within the business hours, according to the usages of the place of payment.

So, where a note was made payable at the Mechanics' and Traders' Bank, but was deposited in the Canal Bank for collection, and not presented at the place of payment during banking hours, and no attempt to demand payment until after the usual banking hours: *Held*, that the endorser was thereby discharged.

This is an action against the payee and endorser of a promissory note. The note was made payable at the Mechanics' and Traders' Bank in New-Orleans, and lodged in the Canal Bank for collection. The notary states in his

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protest, that "at the request of the cashier of the Canal Bank, he went several times to the Mechanics' and Traders' Bank, where the note was made payable, *in order to demand payment*, and found the *same shut*; the said note having been delivered to him for protest, *after three o'clock, P. M.*," on the last day of grace.

The defendant pleaded a general denial, and set up several other matters of defence.

The case was submitted to a jury, with testimony relative to the custom of making demand of payment and protest of notes, and also the custom and hours of business of banks. The jury returned a special verdict as stated in the opinion of this court, and left it to the court below to decide on the legal consequence of the facts they had found, and to pronounce judgment.

A rule was taken on the defendant by plaintiff's counsel, to show cause why judgment should not be rendered for the plaintiffs on the verdict. The defendant showed cause; and on the trial of the rule, the judge presiding gave judgment for the defendant. The plaintiffs appealed.

Jones, and C. M. Conrad, for the plaintiffs and appellants.

Grymes, contra.

Bullard, J., delivered the opinion of the court.

This is an action by the holder against the endorser of a promissory note, made payable at the Mechanics' and Traders' Bank in New-Orleans, upon the usual allegations of demand and notice of non-payment.

The jury, sworn to try the case, found a special verdict. They found that the note was deposited in the Canal Bank for collection; that no attempt was made to demand payment at the Mechanics' and Traders' Bank until after the usual banking hours, and when attempted to be made the bank was closed. They further found that it was not usual among the banks to deliver out notes to the notary, to make demand and protest, until three o'clock; that the drawers were not at the bank on the day the note fell due, and made no offer to

pay, nor had they any funds there; and that the bank would not have paid even if they had had funds, without the special order of the drawers. The jury leaves the legal conclusion to the court.

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If the court were not to look beyond the special verdict, it is manifest that the judgment would be without hesitation in favor of the endorser, because the jury has not found that any notice was given. But as all the evidence is before us, it is agreed by the parties, that we may take the whole case into consideration, and decide whether, independently of the special verdict, there is sufficient evidence in the record to bind the endorser.

The notary certifies in his protest, that he went several times to the bank where the note was made payable, in order to demand payment thereof, and found the same shut; the note having been delivered to him for protest after three o'clock, P. M. It is in evidence that all the banks in the city are closed at three o'clock, and this usage is undisputed.

The law is well settled, that a presentment for payment must be made within the business hours, according to the usages of the place where it is made payable. The authority of Chitty is explicit on this point. "A presentment for payment of a bill, says that author, payable on a day certain, should in all cases be made within a reasonable time before the expiration of the day when it is due; and if by the known custom of any particular place, bills are only payable within limited hours, a presentment there, out of those hours, would be improper. This rule extends also to a presentment out of the hours of business, to a person of a particular description, where by the known custom of the place all such persons begin and leave off business at stated hours; and, therefore, when a bill is accepted, payable at a banker's, it must be presented there before five o'clock, or the usual hour of shutting up their shop, and presentment afterwards will not entitle the notary to protest it." *Chitty on Bills*, 286.

The law is well settled, that a presentment for payment, at the place where a note is made payable, must be made within the business hours, according to the usages of the place of payment.

But it is contended that the jury has found in this case, that a usage prevails among the banks when notes are deposited for collection, payable in other banks, not to give

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So, where a note was made payable at the Mechanics' and Traders' Bank, but was deposited in the Canal Bank for collection, and not presented at the place of payment during banking hours, and no attempt to demand payment until after the usual banking hours: *Held*, that the endorser was thereby discharged.

them out to the notary, for presentment, until three o'clock. We do not so understand the verdict. The jury, it is true, find that it is the usage not to give out notes to the notary for presentment and protest, before three o'clock generally; but not that such is the usage when the note to be presented is made payable at a particular bank. If that had been expressly their verdict, it would not, in our opinion, have been sustained by the evidence in the record. As it relates to notes or bills not payable at a bank, the practice alleged has nothing in it inconsistent with the rights of the parties, for the demand may be made at any time during the last day of grace; but a custom not to present a note payable at a particular bank, until the bank is closed for the day, or in other words not to present it at all, is utterly repugnant to the well settled law of the land, in reference to which such contracts are entered into.

We conclude, therefore, that, whether we confine our attention to the special verdict, or take into view all the evidence in the record, the plaintiffs have failed to show the liability of the defendant.

The judgment of the Commercial Court is, therefore, affirmed, with costs.

TOULMAN ET AL., OWNERS OF BRIG HOKOMOK,

VS.

ELLIOTT ET AL., MASTERS AND OWNERS OF THE SHIPS ROWENA
AND NEW-ORLEANS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action of damages against the masters and owners of two ships, for collision and injury of the plaintiff's vessel, when he had offered all his evidence, one of the defendants (who severed in their pleas,) moved and

obtained a judgment of non-suit; and the other was permitted to introduce evidence proving his own innocence, and showing that the conduct of the defendant, obtaining the non-suit, was the remote cause of the collision and injury complained of.

It is within the discretion of the court to allow or cause a witness to be called and sworn after the evidence of both parties has been closed, and the arguments had progressed, if the court is of opinion, more light and information is needed on the matter in contest.

A new trial is within the sound discretion of the court, to which the application is made; and this court never interferes in such cases, unless there is manifest error.

A non-suit, legally obtained, the party cannot be deprived of it in an action of damages against the masters and owners of the ships New-Orleans and Rowena.

The plaintiffs allege, they are the owners of the brig Hokomok, and that on the 8th February, 1836, in the Mississippi river, the defendants, in consequence of their negligent and unskillful conduct, in the management of their respective vessels, which were both adrift in the river, they brought them in contact and collision of the brig, which was lying safely moored at the levee port, and occasioned loss and damage in her hull and rigging, amounting to six hundred dollars, for which they are liable. The defendants severed in their answers. Each pleaded a general denial.

The plaintiffs offered all their testimony and rested their case. The counsel for one of the defendants moved for and obtained a judgment of non-suit. The plaintiffs objected, and excepted to the decision of the court in rendering it.

The other defendant proceeded with the trial, and offered evidence to prove that the injury sustained was occasioned by the fault of the ship New-Orleans, owned by the other defendant, who had obtained the judgment of non-suit, which was lying several tiers above the plaintiffs' vessel, and put adrift the other one. This evidence was objected to by the plaintiffs' counsel, on the ground that the remote cause of the accident should have been specially pleaded. The objections were overruled, and a bill of exception taken.

On the trial, after the testimony closed on both sides, and

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the plaintiffs' counsel had commenced his closing argument, the judge called a man by the name of Pollock, who was ordered to be sworn, which was objected to by the plaintiff's counsel, on the ground that it was contrary to the Code of Practice. The court said it wished for light and information on the matter in contest, and a bill of exception was taken to the decision of the court.

There was judgment for the other defendant, and the plaintiff, after an unsuccessful effort to obtain a new trial, on newly discovered evidence, appealed from both judgments.

Josephs, for the plaintiffs and appellants.

1. The district judge, after both parties had produced their respective evidence, all incidental questions had been decided, and the defendant had concluded his argument upon the merits, and when the plaintiff was about to submit the cause, called an individual from among the bystanders, (Pollock,) who had not been introduced nor examined by either of the parties to the suit, and without the consent of the plaintiff, caused him to be sworn and examined, as a witness upon certain new points material to the defence of the same.

2. The judgment of non-suit was improvidently granted, it having been shown that the ship New-Orleans was floating down the river, fastened to the barque Rowena, and was in that situation at the time of the collision with plaintiffs' vessel.

3. That the remote cause of the getting adrift (by the fault of another,) or excuse admitted by the court, the same having occurred a considerable distance up the river, above the vessel of the plaintiff, and some time before the collision by which his said vessel was injured, should have been specially set forth in the answer, and that the district judge erred in suffering the defendant to surprise the plaintiff, by going into the investigation of the same under the general issue.

Rosellus and *T. Slidell*, for the defendants.

Martin, J., delivered the opinion of the court.

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The plaintiffs claim damages from the defendants, as masters of two vessels, for a collision and injury to their vessel, occasioned by the negligent conduct of the defendants.

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There was a judgment in favor of one of the defendants, and of non-suit in favor of the other. The plaintiffs appealed.

The defendants severed in their pleas; and after the plaintiffs introduced all their evidence, the counsel of one of the defendants moved for a non-suit, which was granted.

The other defendant proceeded with his testimony, and it is contended and established, that the collision was occasioned by the fault or neglect of the defendant who had obtained the judgment of non-suit.

There are two bills of exception to be examined; neither of which affect the defendant who had the judgment of non-suit, for they were posterior thereto.

The first is taken to the admission of testimony, to show that the collision resulted from the conduct of the latter defendant; but was objected to on the ground, that if this was the case, his conduct was the remote cause of the collision, and should have been specially pleaded. The judge *a quo*, correctly concluded that the testimony was admissible, because it supported the allegation that there was no negligence or unskillfulness on the part of the defendant who offered it.

In an action of damages against the masters and owners of two ships, for collision, and injury of the plaintiffs' vessel, when he had offered all his evidence, one of the defendants, (who severed in their pleas,) moved and obtained a judgment of non-suit, and the other was permitted to introduce evidence proving his own innocence, and showing that the conduct of the defendant, obtaining the non-suit was the remote cause of the collision and injury complained of.

The second bill of exceptions is taken to the call of the judge to a bystander, to be interrogated as a witness, after the evidence of both parties was closed and the argument had progressed; the judge being of opinion that he needed light and information on the matter to which he directed his interrogatories.

It is true the Code of Practice, article 484, says: "after all incidental questions are decided, and both parties produced their evidence, the argument commences, and no witness or proof can be introduced without the consent of all parties." The object of this is clearly to induce parties to present at once all their evidence, by depriving them of the means of

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It is within the discretion of the court to allow or cause a witness to be called and sworn after the evidence of both parties has been closed, and the arguments have progressed, if the court is of opinion more light and information is needed on the matter in contest.

A new trial is within the sound discretion of the court to which the application is made; and this court never interferes, in such cases unless there is manifest error.

A non-suit, legally obtained, the party cannot be deprived of it in an action of damages against the masters and owners of the ships *New-Orleans* and *Rowena*.

eking it out, by interrupting the argument for the introduction of the same, or other witnesses, or of documents.

In the case of *Richardson vs. Debuys* and *Longer*, 4 *Martin*, N. S., 127, we held that the judge *a quo*, correctly overruled the opposition of the defendant to the admission of a witness offered by the plaintiff, after "the parties had closed their evidence," and the arguments had commenced; being of opinion it is within the discretion of the court to permit a witness to be sworn, even at that period of the trial.

A new trial was asked, on the ground of newly discovered evidence, and refused. Such a refusal is in the discretion of the inferior court; and it has been questioned whether this court could inquire into the correctness of the manner in which this discretion was exercised in the case of a continuance, over which it has a like control. *Trahan's Heirs vs. Broussard*, 4 *Martin*, 516.

This court never interferes in such cases, unless there be manifest error in the exercise of this discretion. In the present case the district judge examined the question of the new trial with great minuteness and detail, and stated his reasons at large. It does not appear to us that he erred.

On the merits, judgment was correctly given in favor of one of the defendants; and the plaintiffs can avail themselves of a new action against the other, who obtained the non-suit, if they believe they can establish their claim. The non-suit was legally and fairly obtained, and the party cannot be legally deprived of it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

FLORENCE vs. M'FARLANE.

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The general issue dispenses with proof of the signature of the defendant, who is sued alone as maker of a note, but not that of the payee and first endorser.

Where the judgment of the inferior court states, that "the plaintiff proved all his allegations," and there is no proof of the signature of the first endorser in the record, the case will be remanded for another trial.

This is an action against the defendant as the maker of a note, payable to the order of Henry H. Marks, and by him endorsed in blank.

The defendant pleaded a general denial; and upon the production of the note and protest in evidence, there was judgment against him.

The judge states, in his judgment, that the plaintiff proved all the allegations in his petition; but there is no evidence in the record of the signature of the payee and endorser.

The defendant appealed.

Josephs, for the plaintiff and appellee.

Durant, for the appellant.

Martin, J., delivered the opinion of the court.

The defendant, sued on his promissory note by an endorsee, pleaded the general issue. Judgment was given against him, and he appealed.

The plea of the general issue dispenses with proof of the signature of the defendant, but not that of the payee and first endorser. The court, in its judgment, attests that the plaintiff proved all his allegations. This circumstance does not enable us to consider the signature of the payee as proved, when no evidence of it appears in any other part of the record; but it raises such a presumption as, in our opinion, authorizes us to conclude that justice requires the case should be remanded.

The general issue dispenses with proof of the signature of the defendant who is sued alone as maker of a note but not that of the payee and first endorser.

Where the judgment of the inferior court states that "the plaintiff proved all his allegations," and there is no proof of the signature of the first endorser in the record, the case will be remanded for another trial.

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SPEARING.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be annulled and reversed, and the case remanded for further proceedings according to law; the plaintiff and appellee paying the costs of the appeal.

JOHNSON ET AL. VS. SPEARING.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

The party wishing to appeal, and have the judgment of the inferior court revised, must see that the evidence is taken down in writing, or a statement of facts made out; otherwise judgment will be affirmed, with damages.

This is an action against the defendant on his two promissory notes, given for the price of fifty-nine coils of bale rope. The notes were payable to the order of Peter Laidlaw, and by him endorsed in blank. He acted for the plaintiffs and had the bale rope sequestered.

The defendant pleaded a general denial. There was judgment for the plaintiff, and the defendant prayed and obtained a suspensive appeal, but failed to have the testimony taken down, or a statement of facts made out. The appellees brought up the record after the return day, and prayed for the affirmance of the judgment with damages.

Strawbridge, for the plaintiffs.

Grivot, contra.

Morphy, J., delivered the opinion of the court.

Plaintiffs brought suit on two promissory notes given to them by defendant, in payment of fifty coils of rope which they caused to be sequestered. No serious defence being made below, judgment was rendered against the defendants,

and the property sequestered ordered to be sold to satisfy the same. EASTERN DIST.
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The defendant took this appeal, which was returnable on the fourth Monday of July, 1839, but the record was filed in this court, only on the 2d of January last, by the appellees, who demand damages for the frivolous appeal.

It has been contended by the appellant, that the judgment below should be reversed, because there is no evidence that the plaintiffs have any interest in the notes sued on, which are made to the order of Peter Laidlaw, or that they have any claim or privilege on the fifty coils of rope ordered to be sold by the judge. Peter Laidlaw, as agent of the plaintiffs, took the necessary oath in order to obtain the writ of sequestration. He appears to have been examined as a witness on the trial, but his testimony is not to be found in the record, which, according to the clerk's certificate, does not contain all the evidence adduced below. The party who wishes this court to review, on its merits, a judgment of which he complains, should take care to have the testimony reduced to writing, or a statement of facts made out; when this is not done, we cannot say that the judgment appealed from is not sustained by sufficient evidence. The presumption on the contrary is, that the appellees have fully made out their case on the trial below. This appeal appears to us to have been taken only for delay.

The party wishing to appeal and have the judgment of the inferior court revised, must see that the evidence is taken down in writing, or a statement of facts made out; otherwise judgment will be affirmed with damages.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs and ten per cent. damages.

MOORE ET AL. vs. COCHRAN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The promise to pay a debt at certain periods, if a note given to the creditor for collection was *not collected*, is not absolute, but conditional; and as the collection of the note would have extinguished the debtor's obligation; so, if it has not been collected through the fault of the creditor, the consequence must be the same.

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This is an action instituted on the following agreement, and also on the four promissory notes mentioned in it as having been given up.

"New-Orleans, May 23, 1837."

"In consideration that Joseph L. Moore & Co. have this day given up to me my four notes, drawn by me in their favor, (amounting, in all, to six thousand nine hundred and twenty-eight dollars twenty-six cents,) for the security of the payment of which, they hold a note drawn by Chouteau & Payne, payable to and endorsed by me, dated May 18, 1836, at six months, for seven thousand eight hundred and thirty-two dollars, with interest at the rate of eight per cent. per annum from maturity; I agree to pay them one-half the amount of said notes given up, on the first day of December next, and the other half of said amount on the first day of April next, with interest at the rate of eight per cent. per annum after maturity; *provided said note of Chouteau & Payne be not collected.*

A. G. COCHRAN."

The plaintiffs acknowledge this agreement, and say: "We agree not to call on said Cochran, as *endorser* of said note, provided he pay to us, on the first day of December next, the one-half of six thousand nine hundred and twenty-eight dollars, and the other half of said amount on the first day of April next, with interest, &c., according to previous agreement; on payment of which, said note is to be given up to said Cochran."

The defendant admitted his signature to the notes, but averred that the plaintiffs delivered them up to him for the note of Chouteau & Payne, which they have never made any effort to collect. He prays to be dismissed with his costs.

The evidence showed that Chouteau & Payne were in good credit and solvent, at the maturity of their note, and when it came into the possession of the plaintiffs; but it is not shown that they made any effort to collect it. It remained unpaid in December, 1837, when this suit was commenced.

The district judge was of opinion that the collection of this note was *not a suspensive condition*, under the agreement of May 23, 1837, and that the defendant had no right to require a discussion of Chouteau & Payne's property, being

already bound *in solido* with them as payee and endorser of their note. But as the present suit was instituted before the 1st of April, 1838, it was premature as to one-half of the demand. There was judgment for one-half of the debt, which became due the 1st December, 1837, with interest; and the defendant appealed.

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L. C. Duncan, for the plaintiffs, urged the affirmance of the judgment.

Straubridge, contra, insisted that there was error in the judgment, which should have been for the defendant.

Martin, J., delivered the opinion of the court.

This is an action on an agreement by which the defendant engaged to pay a debt which he owed to the plaintiffs, in two instalments, in case a note of one of his debtors, of nearly the same amount, which he placed in the plaintiffs' hands for collection, was not collected by them. There was judgment in favor of the plaintiffs for one-half of the debt, or first instalment, the court being of opinion the action was premature as to the second. The defendant appealed.

The record shows that the note which the plaintiff received for collection, was not paid; but there is no evidence of any attempt on their part to collect it.

It is contended that the defendant, who is the payee, having written on the back of the note that he waived protest, there was no necessity of the plaintiffs showing any attempt to collect it. It is unnecessary to examine whether the plaintiffs might or not have brought their action on the note against the defendant as endorser, because they have not done so. They have chosen to resort to their action on the agreement. The promise of the defendant therein was not absolute, but conditional. The district judge has thought that the collection of the note was not a suspensive condition of the defendant's obligation to pay. The collection of the note would have prevented the defendant's obligation from taking effect. If this collection has not been made, through the fault of the plaintiffs, the consequence is the same with

The promise to pay a debt at certain periods, if a note given to the creditor for collection was not collected, is not absolute, but conditional; and as the collection of the note would have extinguished the debtor's obligation, so, if it has not been collected through the fault of the creditor, the consequence must be the same.

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regard to the obligation of the defendant. They received the note for the purpose of collection. If they neglected to inform the makers that the note was placed in their hands for that purpose; if they made no demand, it is to be imputed to their own laches that the note remains unpaid. Their neglect cannot give rise to the defendant's obligation. The protest was to be an act posterior to the demand and refusal to pay the note. The waiver of it did not dispense the plaintiffs from doing what they were bound to do independently of the protest itself, viz: *that*, without which, the collection of the note was hopeless.

The District Court, therefore, in our opinion, erred in giving judgment for the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, and that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

BURKE, WATT & CO. VS. TAYLOR; N. & E. FORD & CO.,
GARNISHEES.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When judgment has been rendered against the defendant, proceedings may be immediately had against the garnishees, to pay over the funds or effects, even before final judgment is signed.

If the answers of garnishees state facts which the plaintiffs attempt to disprove, it is a proper case for a jury; but when the question is entirely one of law, relating to the sufficiency of the answers, and the legal inferences deducible from them, the court will decide.

The promise of garnishees to pay the defendant's drafts or bills, can give them no privilege or claim on any funds of his coming into their hands, over third persons or attaching creditors, who seize them before actual payment; and if they subsequently pay them, they cannot plead compensation to the vested rights of attaching creditors.

This is an action by the payees of a bill of exchange, against the drawer. The defendant, at Columbia, in Arkansas, on the 5th July, 1837, drew his bill for one thousand seven hundred and fifty-one dollars, in favor of the plaintiffs, on N. & E. Ford & Co., of New-Orleans, which was protested at maturity for non-payment.

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The plaintiffs, on the 20th October, 1837, commenced suit by attachment, which was levied the same day on all the property, rights and credits of every kind, in the hands and possession of N. & E. Ford & Co., and belonging to the defendant. They were cited as garnishees, and required to answer interrogatories:

1. Had they in their possession, or under their control, any goods or effects, real or personal, belonging to the defendant?
2. Are you indebted to the defendant, in any sum of money now due, or to become due hereafter?
3. Are you the agent of any person or firm who is indebted to the defendant, in any sum due, or to become due? If yea, state the amount.
4. Do you know of any sum of money due, or to become due, by any person or firm, to the defendant? If yea, state the same fully and at large.

To these interrogatories, N. & E. Ford & Co. made the following answers:

1. They have some money belonging to Wm. Taylor.
2. We are indebted to Wm. Taylor.
3. No.

4. We are indebted to Wm. Taylor in the sum of one hundred and thirty-two dollars forty-nine cents; that being the balance now in our hands. Wm. Taylor had a letter of credit from the house of N. & E. Ford & Co. for the sum of two thousand dollars; the balance of the money belonging to him was appropriated to meet that letter of credit.

The plaintiffs obtained judgment on the 26th November, 1838, against the defendant, and the next day took a rule on the garnishees, to show cause why judgment should not be entered against them for the amount of the plaintiff's

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demand; first, because their answers do not fairly and truly set forth the amount of money or other property they hold of the defendants, but are evasive and insufficient; second, by their own showing, they hold an amount sufficient to pay and satisfy the attachment demand, which is subject to it.

The garnishees averred they had answered fairly, and truly set forth what amount of money they had in their hands belonging to the defendant, and that the plaintiffs have no claim against them, except for the balance they admit, and which they are ready to pay over. They pray for a trial by jury; which was refused by the court, and they took a bill of exceptions. Evidence was produced in support of the answers, and to show that the garnishees had paid drafts of the defendant, and reducing their fund to the amount admitted to be on hand.

There was judgment against them on the rule, and they appealed.

Josephs, for the plaintiffs and appellees, urged the affirmation of the judgment.

Jones, for the garnishees and appellants, insisted: First, that the rule taken against the garnishees to show cause why they should not pay the amount of judgment against defendant, was premature; it was taken on the day succeeding the trial of the case between plaintiffs and defendant, and before there was any final judgment. Second, no notice of judgment has ever been served on defendant, or on any person representing him. Third, the court erred in refusing the garnishees a trial by jury, as prayed for in answer to rule. See the case of *Gale vs. Quick's Bail*, 2 *Louisiana Reports*, 348; *Meeker's Assignees vs. Williamson et al., Syndics*, 7 *Martin*, 317. Fourth, the judgment is contrary to the evidence on file; the answers of the garnishees are full and explicit, and the evidence taken supports them.

Morphy, J., delivered the opinion of the court.

This is a case of attachment, in which N. & E. Ford & Co. were made garnishees, and interrogated in order to ascertain whether they had in their possession any property or funds belonging to the defendant, or were in any manner indebted to him, at the time the interrogatories were served on them. The answers were considered by the court below as insufficient and evasive. Judgment being rendered against the defendant, the garnishees were condemned to pay the amount of it, and from this judgment they have appealed. Before coming to the merits of this case, two preliminary questions must be disposed of.

It has been contended that the action of the court below against the garnishees, was premature, because the judgment against the defendant had not yet become final. The record shows that judgment was rendered on the 26th of November, 1838, against Taylor; that the next day a rule was taken on the garnishees, but that it was tried only on the 8th of December following; several days after the judgment had been signed, and had become final. In this proceeding we can see nothing of which the garnishees can complain. The signing of a judgment relates back to the time of its rendition. No hardship was imposed on the appellants, nor did they have any advantage, by the course pursued. They were permitted to file their answers more than two weeks after the service of the interrogatories on them, and no step was taken in the cause for more than twelve months afterwards. It might as well be contended that no action is to be had against a garnishee, until the judgment against the defendant be affirmed in the appellate court.

Our attention was next called to a bill of exceptions to the opinion of the judge, for refusing to grant the garnishees a trial by jury. We think that the judge did not err. Had the answers stated facts which the plaintiffs had undertaken to disprove, the pleadings would have presented such an issue as would have been properly within the province of a jury; but here, the question was one entirely of law. It turned on the sufficiency of garnishees' answers, under the

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When judgment has been rendered against the defendant, proceedings may be immediately had against the garnishees to pay over the funds or effects; even before final judgment is signed.

If the answers of garnishees state facts which the plaintiffs attempt to disprove, it is a proper case for a jury, but when the question is entirely one of law, relating to the sufficiency of the answers, and the legal inferences deducible from them, the court will decide.

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provisions of our law, and on the legal inferences deducible from them.

The answers of these garnishees are far from being clear and categorical, as required by article 262 of the Code of Practice. The answer to the fourth interrogatory is in these words: "We are indebted to Wm Taylor in the sum of one hundred and thirty-two dollars, forty-nine cents, that being the balance now in our hands. Wm. Taylor had a letter of credit from the house of N. & E. Ford & Co., for the sum of two thousand dollars; the balance of the money belonging to him was appropriated to meet that letter of credit." This answer, taken by itself, is clearly insufficient and unsatisfactory. It was made on the 8th of November, 1837. It does not show the state of the accounts between garnishees and defendant at that date, and still less on the 20th of October preceding, when the service of the attachment was made on them. Was this letter of credit ever used by defendant, and at what time? If it was used, had garnishees paid any amount drawn against it, and what amount? It is stated that out of a sum of two thousand one hundred and thirty-three dollars, forty-nine cents, belonging to defendant, two thousand dollars had been appropriated to meet this letter of credit, having only in their hands a balance of one hundred and thirty-three dollars forty-nine cents; but by whom, and at what time, was such appropriation made? The answer can solve none of these important inquiries. Considered alone, it amounts to an admission that the garnishees were in possession of funds sufficient to cover the demand of plaintiffs, but that they thought themselves authorized to appropriate and retain the amount of a letter of credit they had given the defendant. It was the undoubted province of the court, not of a jury, to pronounce on the sufficiency of these answers, and on the right assumed by these garnishees to pay themselves in preference to the plaintiffs. The appellants appear to have been themselves aware of the vagueness of their answers, for on the trial they endeavored to make them more explicit, by offering in evidence a letter of credit of the 16th of February, 1837,

given by them to the defendant, and a protested draft drawn on them by Taylor, dated the 1st of March of the same year. From a line written across the draft, it would appear to have been paid by appellants more than a month after the service of the plaintiffs' attachment on them. This evidence was received below, subject to all legal exceptions. Its admissibility is extremely doubtful; for if a garnishee is not permitted to explain his answers by amending them, there is, perhaps, no good reason why he should have the privilege of explaining them by evidence. But, granting the garnishees the benefit which they claim of introducing this explanatory evidence, it does not materially better their case. If it shows any payment at all by them of Taylor's draft, it shows that payment to be subsequent to the service of the interrogatories on them. Their counsel has urged, that, although at that time they had not actually paid this draft, they had made themselves liable for its amount. He has appealed to a recent decision of this court, in which it has been held that an acceptance made by a factor or commission merchant, on consigned goods, will give the same lien as a cash advance. It is evident that the principles regulating the rights and privileges of factors and commission merchants, are in no manner applicable to the present case. It is clear that the promise to pay the defendants' bills, could give appellants no privilege or claim whatever on any funds of his coming into their hands, to the prejudice of third persons; for until they had actually paid his drafts, they were not his creditors. It is equally clear, that if they did subsequently pay the defendant's draft on them, they cannot now plead compensation in opposition to the vested rights of the attaching creditors. *Louisiana Code, article 2212.*

It has not been proved, nor is it pretended, that Taylor made any specific appropriation or delegation of these particular funds to meet his draft; nothing, therefore, authorized garnishees to retain the amount for which they were only liable, to the prejudice of the plaintiffs, who must receive the reward of their diligence in securing a debt actually due.

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The promise of garnishees to pay the defendants drafts or bills, can give them no privilege or claim on any funds of his coming into their hands, over third persons or attaching creditors, who seize them before actual payment, and if they subsequently pay them they cannot plead compensation to the vested rights of attaching creditors.

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It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

HAMER ET AL. VS. JOHNSON; ARCUEIL ET AL., GARNISHEES.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

In an action against the maker of a note, payable at a particular place, it is necessary to show *presentment* of the note, and *demand* at the place of payment, to entitle the holder to recover.

The Supreme Court of the United States, in the case of Wallace vs. McConnell, 13 Peters, 136, held that *it is not* necessary to allege and prove a *demand* of payment, in an action against the maker of a note, or acceptor of a bill; but that it is a matter of defence, if the defendant can show he was ready at the place of payment, and offered to pay, to be pleaded and proved on his part. This court adheres to its former and contrary decision in the case of *Mellen vs. Croghan*, 3 Martin, N. S. 423.

This is an action against the defendant, John Johnson, who signed a promissory note with one Stephen Johnson, as *security*. The note was executed in the state of Mississippi, "and payable and negotiable at the office of the Planters' Bank at Manchester," in that state. The plaintiffs allege, that when the note became due, the defendant or any one else had no money, either then or afterwards, at the bank to pay such note, and that it remains unpaid.

The suit was commenced by attaching property or assets of the defendant in the hands of Arcueil, Peyroux & Co., who were made garnishees, and required to answer interrogatories. Having failed to answer within *ten days* after service of process, on motion of the plaintiffs' counsel, a judgment *pro confessis* was entered against them, and which the judge refused to set aside on a rule afterwards taken for that purpose, and to allow them to file answers. The judge

presiding considered that garnishees were *fixed*, if they failed to answer *within ten days*. They appealed.

The defendant pleaded a general denial ; and without any evidence of a demand of payment at the place where the note was made payable, there was judgment for the plaintiffs for the amount of the note, and the defendant appealed.

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G. B. Duncan, for the plaintiffs, insisted on the affirmance of the judgment against Johnson, and cited the cases of *United States Bank vs. Smith*, 11 *Wheaton*, 171, and *Wallace vs. M'Connell*, 13 *Peters*, 136 ; and as against the garnishees, the case of *De Blanc vs. Webb*, 5 *Louisiana Reports*, 83, and other cases, were relied on.

Benjamin, for the defendant, contended :

1. That the court erred in giving judgment for plaintiffs, without any evidence being offered by them of a demand for payment at the place where the note was made payable. This court has repeatedly decided, after full argument and examination, that such demand is a condition precedent to the right of recovery, and such is now the settled jurisprudence of this state. See amongst other cases : *Mellen vs. Croghan*, 3 *Martin, N. S.*, 423 ; *Erwin vs. Adams*, 2 *Louisiana Reports*, 318 ; *Morton vs. Pollard*, 10 *Louisiana Reports*, 552 ; *Warren vs. Allnut*, 12 *Louisiana Reports*, 454.
2. In relation to the garnishees, the counsel showed that the judgment *pro confessis*, was against all law and the previous decision of this court, and cited the case of *Proseus vs. Mason et al.*, 12 *Louisiana Reports*, 16, and the cases there cited. *Code of Practice* 263.

Martin, J., delivered the opinion of the court.

This case comes before us on two separate appeals.

1. The plaintiffs instituted suit by attachment against the defendant, on a joint promissory note which he signed *as security*. The note was executed in the state of Mississippi, and made payable to the order of the plaintiffs, at the office of the Planters' Bank, at Manchester, the first of February,

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2. The plaintiffs propounded interrogatories to Arcueil, Peyroux & Co., as garnishees, requiring them to answer, *first*, if they had not under their control, property, moneys, &c., belonging to the defendant, and if so, to state its nature and amount. *Second*, if they were not indebted to the defendant, and in what amount? These interrogatories were served on the 11th June, 1839, on the garnishees, and ordered to be answered in ten days. On the 28th of June, the garnishees not having answered, judgment *pro confessis* was entered against them for the amount of the plaintiffs' demand. This judgment was signed the 26th November, and on the 30th judgment was rendered against the defendant for the original debt. The garnishees have appealed.

In an action against the maker of a note, payable at a particular place, it is necessary to show *presentment* of the note and *demand* at the place of payment, to entitle the holder to recover.

The Supreme Court of the United States, in the case of *Wallace vs. M'Connell*, 13 Peters, 136, held that it is not necessary to allege and prove a demand of payment, in action against the maker of a note or acceptor of a bill; but that it is a matter of defence, if the defendant can show he was ready at the place of payment and offered to pay, to be pleaded and proved on his part,

I. The counsel for the defendant and appellant contends, that the judge *a quo* erred in rendering judgment against the defendant, without any evidence being offered of a demand of payment at the place where the note was made payable; and has referred us to our own decisions to show that the settled jurisprudence of this court is, that such a demand is a condition precedent to the right of recovery. *Mellen vs. Croghan*, 3 Martin, N. S., 423; *Erwin vs. Adams*, 2 Louisiana Reports, 318; *Morton vs. Pollard*, 10 *idem.*, 552; *Warren vs. Allnut*, 12 *idem.*, 454.

This is certainly correct, but the adverse counsel relies on the case of *Wallace vs. M'Connell*, 13 Peters 136, in which the Supreme Court of the United States held, that it is not necessary to allege and prove a demand of payment in order to maintain an action against the maker of a note or acceptor of a bill; but is matter of defence, if the maker or acceptor was ready at the place and offered to pay, to be pleaded and proved on his part. The court observes that this was the first time that the question was directly presented for their decision and they solved it, according to the current of decisions of the courts in the several states of the Union, without expressing or intimating any opinion, whether the grounds on which this rule was established, were questionable. In

England, from whence most, if not all, the other states derive their commercial law, this question was unsettled until the year 1820; the jurisprudence of the Court of Common Pleas being the same as *that* established by the decision of this court; and *that* of the Court of King's Bench, in accordance with the principle lately recognized by the Supreme Court of the United States, in the case above cited. In that year the House of Lords reversed a judgment of the Court of King's Bench, and sanctioned the doctrine, that in an action against the acceptor of a bill of exchange, payable at a particular place, the plaintiff must aver and prove presentment at the place of payment in order to recover. *Rowe vs. Young, 2 Brodcrip & Bingham, 165.*

The parliament was induced by this decision, immediately to pass an act declaring, "that after the 1st August, 1821, if a bill of exchange was accepted, payable at the house of a banker, or other place, without further expression in his acceptance, it shall be deemed and taken a *general acceptance* of such bill; but if the acceptor shall in his acceptance, express that he accepts the bill, payable at a banker's house or other place *only, and not otherwise, or elsewhere*, such acceptance shall be a qualified acceptance, and the acceptor shall not be liable to pay the bill except in default of payment, when such payment shall have been first duly demanded at the place of payment."

We do not consider ourselves at liberty to change the settled jurisprudence of this court. It is meet, that while we settle the rights of the parties litigant before us, the rest of the community should find in our decisions a rule on which they may rest assured that future cases of the same kind will receive the same determination; that our decisions should be beacons, not decoys or snares. If the principles which we establish are found inconvenient, the legislature may do what was done by the parliament of England, and fix a rule by which future cases may be determined.

The plaintiffs in this case have not shown presentment of the note sued on at the place of payment, and are not consequently entitled to recover. The judgment of the court below must, therefore, be reversed.

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This court adheres to its former and contrary decision in the case of *Mellen vs. Croghan, 3 Martin, N. S., 423.*

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II. The judgment against the garnishees being based on that against the defendant, must follow it, and share the same fate.

It is, therefore, ordered, adjudged and decreed, that both judgments of the Commercial Court be annulled and reversed, and that the case be remanded for a new trial; the plaintiffs and appellees paying costs of the appeal.

SAUL VS. NICOLET'S EXECUTORS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
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The mere renewal of notes with an endorser, and making partial payments does not operate a novation, nor deprive the vendor of his privilege on the thing sold, in the hands of his vendee.

So, the renewal of notes given as evidence of an hypothecary or privileged debt, and an extension of time, is not *per se* a novation, or extinguishment of the mortgage or privilege.

Where notes for the price of bank stock are renewed, and the plaintiff's agent endorses them, gets them discounted in bank, and at maturity takes them up for his principal, they return with a subrogation to all the privileges, and the original holder can recover and enforce his privilege on the stock, against the maker, his vendee.

This is an action against the executors of the late Theodore Nicolet, for the balance due of the price of five hundred shares of Gas Light Bank stock, sold by J. A. Merle & Co., as agents of the plaintiff.

It is shown that on the 15th December, 1836, the plaintiff, through his said agent, sold to Nicolet & Co. said bank stock, and took their notes, payable at sixty and ninety days, for the price. When these notes became due, there were

partial payments made, and they were renewed for the balance several times, with J. A. Merle & Co.'s endorsement, who, the last time of renewal, had them discounted in bank, but took them up at maturity. On getting the notes discounted, Merle & Co. remitted the proceeds to the plaintiff.

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This suit is instituted in the name of the plaintiff against the executors of Nicolet, the maker of the notes, to recover the balance remaining due, for which judgment is prayed, together with the vendor's privilege on four hundred shares of *said stock*, in the hands of the executors of the deceased.

There was a general denial pleaded by the executors and attorney for absent heirs.

There was judgment for the plaintiff, and the executors appealed.

Eustis, for the plaintiff, contended that the original contract not having been discharged nor the party released, the privilege of the vendor remains unimpaired and in full force.

Grima and *Lockett*, for the defendants and appellants, insisted that the plaintiff had no privilege on the stock in the hands of the executors, for the unpaid balance of the price; because the *debt* created by giving the original notes was *novated*, and the privilege thereby extinguished.

Eustis, in reply, further urged that the original privilege and obligation was not affected by the incident of the delivery of the notes of the purchaser, except as to the *term*.

2. That on the non-payment of the notes at the expiration of the term, the plaintiff's rights in the obligation and privilege became entire; and the amount thereof, with the privilege, became demandable.

Bullard, J., delivered the opinion of the court.

The plaintiff claims of the estate of Nicolet a balance due upon the price of five hundred shares of bank stock, sold by his agent, J. A. Merle & Co., to Theodore Nicolet, deceased, with the privilege of vendor upon four hundred shares of the stock still remaining in possession of his executor. The

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executor and the attorney of absent heirs answer by a general denial. The plaintiff had judgment according to the prayer of his petition, and the executor appealed.

It is shown that the bank stock was sold to John A. Merle & Co., as agents of the plaintiff; that Nicolet gave four promissory notes, two at sixty and two at ninety days; that they were renewed at maturity, and afterwards partial payments were made. The notes, both original and in renewal, were made payable to the order of J. A. Merle & Co., and were endorsed by them and discounted in bank. They were finally taken up by Merle & Co.

The mere renewal of notes with an endorser and making partial payments, does not operate a novation, nor deprive the vendor of his privilege on the thing sold in the hands of his vendee.

So, the renewal of notes given as evidence of a hypothecary or privileged debt, and an extension of time, is not, *per se*, a novation; or extinguishment of the mortgage or privilege.

It has been argued by the appellants that the privilege of vendor no longer exists, inasmuch as the debt due by Nicolet & Co. for the price of the stock has been novated, by the renewal of the notes with an endorser, and their transfer to the bank, if not by taking the notes of Nicolet & Co. in payment of the same. It will certainly not be contended that the taking of notes for the price, by the agent of the vendor, operated a novation. No intention to novate or to renounce the privilege of vendor, can be inferred from the mere executing of notes for the price to the agent and in his name. It only remains to inquire whether the renewal of them subsequently, and their negotiation through bank by means of the endorsement of the agents, has produced that result.

Novation is not presumed; it must result clearly from the declaration or the acts of the parties. The mere renewal of notes, given as evidence of an hypothecary or privileged debt and an extension of time, has never been held by this court as amounting *per se* to a novation, and a consequent extinguishment of the mortgage or privilege. On the contrary, in the case of *Cox vs. Rabaud's syndic*, 4 *Martin's Reports*, 11, the court said, (*arguendo*), "the notes certainly did not extinguish the mortgage; for if either the original notes, or any of those subsequently given for the renewal of them, was unpaid at maturity, in the hands of the plaintiff, he might resort to his mortgage." And again: "We are of opinion that the plaintiff cannot avail himself of his mortgage, unless

he show that he still holds the original notes or either of them, **EASTERN DIST.**
 or any other *clearly proven to be given for the renewal of the* **April, 1840.**
original."

The same question came again before the court in the case of Hobson et al. vs. Davidson's Syndic, which is strongly analagous to this, and the principle recognized in the case first mentioned was again sanctioned by the court and formed the basis of its judgment. It is not necessary to repeat the reasoning of the court, or to refer particularly to the authorities, especially those of Pothier and of Merlin, upon which the court relied. We still consider that case as exhibiting a correct application of the principles of law to cases like this. **8 Martin, 428.**

But the appellant contends that the case now before the court differs essentially from the one just mentioned, and that in this case the novation clearly results from the substitution of a new creditor, to wit, the bank; and that when the notes were discounted they became the property of the bank; that Nicolet & Co. became the debtors of the bank and not of the plaintiff, who was paid by the funds advanced by the bank.

To this it may be answered, that when the bank became proprietor of the notes as endorsee, it took them with all the privileges or mortgages by which their ultimate payment was secured; and that when, afterwards, they were taken up by J. A. Merle & Co., they returned with a subrogation to the same privilege. They must, therefore, be regarded in the hands of Merle & Co., as if they had never been negotiated in bank. But it is objected that Merle & Co., the endorsers, were no longer to be regarded as agents of the plaintiff, but as having endorsed for the accommodation of Nicolet & Co., and, therefore, on their refunding the bank, having remitted the whole amount to Saul, the plaintiff, they alone, in their own right, could recover of the estate of Nicolet. There is nothing to show that Merle & Co. ceased to be the agents of Saul, and Saul, by instituting this action, necessarily ratifies their acts in the premises. We cannot infer from the mere circumstance of Merle & Co. having remitted the amount to Saul, that they had made the debt

Where notes for the price of bank stock are renewed, and the plaintiff's agent endorses them, and gets them discounted in bank, and, at maturity, takes them up for his principal, they return with a subrogation to all the privileges, and the original holder can recover and enforce his privilege on the stock against the maker, his vendee.

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their own ; on the contrary, it is more probable that the agents were refunded the amount thus remitted. If the right of the plaintiff to sue had been specially contested, it may have been shown, that in point of fact, Saul never did seek to throw any loss upon his agents, by retaining the amount remitted as the proceeds of the notes given for the stock ; and a reason for supposing so is, that Merle & Co. did not charge a commission for guaranty. It is true, that under the general rule, the plaintiff must show his right to recover ; and if there was no other evidence than that the plaintiff had already received the amount of these notes, we should conclude that he could have no right to recover. But the evidence goes much further. It shows that Merle & Co. were the plaintiff's agents in selling the stock, and making the remittance, and the transaction furnishes no presumption that Merle & Co. intended to render themselves personally liable, or that they intended to give up, for their principal or themselves, a legal right growing out of the contract of sale, that of being paid the price out of the thing sold, so long as it remained in the hands of the vendee. The destruction or renunciation of such a right is not easily presumed ; and the position of the parties before us is strikingly different. The plaintiff, whether acting for himself, or, in point of fact, for his correspondents and agents, J. A. Merle & Co., are endeavoring to avoid a loss ; while the executor, acting for the other creditors of Nicolet & Co. and the absent heirs, seek to gain an advantage at the expense of the plaintiff : "*certant de lucro captando.*"

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

EMMERLING vs. BEEBE ET AL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

EMMERLING

vs.

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Parole evidence cannot be received to prove in substance that a sale of a slave had been rescinded ; or that the former vendor resumed possession, as owner.

In an action by the owner of a slave for his hire and detention, a receipt of a third person to show that he had released the defendants from the cause of action set forth by the plaintiff, is inadmissible in evidence, as not bearing the plaintiff's signature, and as an attempt to prove title to the slave, in another, by incompetent testimony.

This is an action of damages by the plaintiff, as owner of the slave Pierre, for the amount of his hire and for his illegal detention by the defendants, on board their steam tow-boat Tiger.

The defendants pleaded a general denial, and for answer averred, that the slave Pierre was in the possession and under the control of one Moussier, who permitted him to hire himself, and with whom they settled, having him in their employ but a short time, &c.

There was much evidence taken to show the amount of damages sustained by the plaintiff, and that the slave Pierre belonged to the latter, he having purchased him from Gustave Moussier. The defendants offered *parole* evidence to show that after the sale of the slave Pierre to the plaintiff, he allowed Moussier to resume possession of him, and that at the time he was employed on the tow-boat, he was in the actual possession of Moussier, *as owner* ; and that said slave was in the habit of hiring himself to work on the levee and on board steamboats, &c., which testimony was rejected as inadmissible ; tending to prove title to a slave by *parole*. There was a bill of exceptions taken.

A receipt of Moussier was offered, with a witness, to prove that he had given the defendants an entire acquittance against the cause of action set forth in the plaintiff's petition, which was objected to and rejected, on the ground that the receipt did not bear the signature of plaintiff, and it purported

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to prove title to the slave. The defendants' counsel excepted to the opinion of the court.

There was a verdict and judgment in favor of the plaintiff for one hundred and fifty dollars, and the defendants appealed.

Bodin, for the plaintiff.

Roselius, for the appellants.

Bullard, J., delivered the opinion of the court.

The plaintiff sued for damages alleged to have been sustained by him in consequence of the detention and employment, without his knowledge and consent, of his slave on board the defendants' tow-boat. The defendants answer by a denial, averring at the same time, that the slave was at the time in possession and under the control of one Moussier, who permitted him to hire himself out, and with whom they had settled for his wages. And, further, that when the slave was hired on board the *Tiger*, he exhibited free papers.

The jury gave a verdict for the plaintiff, and judgment having been pronounced thereon, the defendants appealed.

During the progress of the trial, it appears that the defendants offered to prove, by Moussier and others, that after the sale of the slave in question to the plaintiff, Moussier, the vendor, resumed possession of him as owner, with the consent and approbation of the plaintiff, and that at the time the slave was employed on board the *Tiger*, he was in the actual possession (as owner,) of the said witness; and that the slave had been in the habit of hiring himself on the levee.

This evidence was objected to, on the ground that title to slaves could not be proved by *parole*, and was rejected; whereupon the defendant took a bill of exceptions. We are of opinion the court did not err. Proof that Moussier had resumed possession of the slave, as owner, with the consent of the plaintiff, was in substance to prove that the sale from the former to the latter, had been rescinded. This cannot be shown by *parole*.

A second bill of exceptions was taken to the refusal of the court to admit in evidence a receipt signed by Moussier, and

Parole evidence cannot be received to prove in substance, that a sale of a slave had been rescinded; or that the former vendor resumed possession as owner.

In an action by the owner of a slave for his hire and detention, a receipt of a third person, to show that he had released the defendants from the cause of action set forth by the plaintiff, is inadmissible in evidence, as not bearing the plaintiff's signature, and as an attempt to prove title to the slave in another, by incompetent testimony.

to admit evidence that Moussier had given an entire release of the whole cause of action. It is obvious that Moussier could not give a valid release, as he had no longer any title to the slave.

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The judgment of the District Court, is, therefore, affirmed, with costs.

ALLARD VS. DE BROT ; MERLE & CO., GARNISHEES.

APPEAL FROM THE COURT FOR THE FIRST DISTRICT.

Garnishees may show, when called on to pay, that the defendant, sued as absent, was in fact dead, at or before the institution of suit, and that, consequently, a payment by the garnishees would not be valid.

This is an action against the payee and first endorser of a promissory note, who is alleged to be absent ; and an attorney was appointed to defendant, and the firm of J. A. Merle & Co. cited as garnishees. The plaintiff proceeded to judgment against the defendant.

On being interrogated, Merle & Co. admitted they owed the defendant a certain sum ; but in answer to a rule taken by the plaintiff on them to pay over this sum in satisfaction of his judgment against the defendant, they say that the defendant was dead at the time of instituting this suit, and that they verily believe the plaintiff knew of this fact before judgment, and that they are not bound to pay over the funds in their hands on such a judgment. The rule was made absolute, and the garnishees condemned to pay over the money. They appealed.

Denis and Labarre, for the plaintiff and appellee.

Soulé, for the appellants.

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Bullard, J., delivered the opinion of the court.

The plaintiff after having recovered a judgment against his absent debtor, took a rule upon the garnishees to show cause why they should not pay into the hands of the sheriff the sum which they acknowledge themselves indebted to the absentee. The garnishees show for cause, that prior to the institution of this suit, De Brot, the defendant, died; and they, the said garnishees, were informed of his death about the 5th February, by a letter from his executors, dated the 29th January, 1839. They further aver, that they believe the plaintiff was fully informed of the death of said De Brot, long before the judgment in this case was rendered.

On the trial of the rule, the appellants, J. A. Merle & Co., offered testimony to establish the facts set forth in their answer, but the court refused to allow such evidence to be introduced, and a bill of exceptions was taken.

Garnishees may show, when called on to pay, that the defendant, sued as absent, was, in fact, dead, at or before the institution of suit, and that, consequently, a payment by the garnishees would not be valid.

We are of opinion the court erred. No judgment had been pronounced against the garnishees, and if it be true that the defendant was dead before the institution of the suit, to the knowledge of the plaintiff, such judgment could give him no rights of preference over other creditors of the deceased, and a payment by the garnishees would not be a valid payment. For their own protection the garnishees have a right to institute such an inquiry.

The judgment of the District Court, upon the rule, is, therefore, reversed, with costs, and the case remanded for a new trial, with directions to the court not to refuse legal evidence to establish the facts alleged by the garnishees in their answer to the rule.

FLORANCE VS. VAURIGAUD ET AL.

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APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

WILSON & CO.

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LIZARDI ET AL.

Appeal taken for delay and judgment affirmed, with the maximum of damages.

This is an action against the maker and endorsers of a note. There was judgment by default made final against all the parties, without any defence. Prats & Son, the endorsers, took a suspensive appeal.

Josephs, for the plaintiff, prayed the affirmance of the judgment, with ten per cent. damages.

Morphy, J., delivered the opinion of the court.

Defendants having been sued as drawers and endorsers of a promissory note, held by plaintiff, suffered judgment by default to be taken against them, which was afterwards confirmed. Jose Prats & Son have appealed, but have not even attempted to show to this court any error in the judgment below. We must, therefore, consider delay as the only object of the appellants and grant the damages prayed for by appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed, with costs and ten per cent. damages.

WILSON & CO. VS. LIZARDI ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plaintiffs' debtor placed drafts in the hands of an agent for collection, with orders to collect and remit the proceeds to the plaintiff, and in the mean time another creditor attached these funds in the hands of the agent: *Held*, that the attachment is good, and that the funds are liable to be attached by other creditors, until placed beyond their reach by remittance.

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The plaintiffs show that they are bankers in London, and that the firm of C. D. Tolmé & Co., bankers in Havana, are largely indebted to them, and had placed drafts in the hands of J. A. Merle & Co., of New-Orleans, with instructions to collect the same and remit the proceeds to them in London; and that by these means they became the owners of said drafts and the proceeds thereof as soon as they were thus appropriated and placed for collection on their account.

They further show that the defendants, M. De Lizardi & Co., and others, claiming to be creditors of the firm of C. D. Tolmé & Co., have attached funds and effects in the possession of J. A. Merle & Co., thus belonging to them, amounting to sixteen thousand and thirty dollars, and claim to hold them in preference. They pray that Merle & Co. be enjoined from paying over said funds to the attaching creditors, or any other persons but them, and that they have judgment declaring all of said funds to belong to them.

The defendants pleaded a general denial: Merle & Co. admitted they held the sum thus attached, subject to the order of the court, but which they believed was the property of the plaintiffs.

The facts were few and clear; that the plaintiffs and Tolmé & Co., being bankers, had an exchange account in which the latter drew bills on the former and covered them at maturity by remittances in sterling bills procured on London, or other places in England; that in order to procure these bills, drafts were sent to Merle & Co., in New-Orleans, as agents of C. D. Tolmé & Co., to collect and remit the proceeds in sterling bills to the plaintiffs. Merle & Co. had no dealings or intercourse with the plaintiffs in any other way, and were unknown to them as regards the dealings between them and Tolmé & Co.

The defendants being also creditors of Tolmé & Co., attached these funds in the hands of Merle & Co., and the question is, to whom do they legally belong?

The district judge was of opinion that the plaintiffs had made out their title to the funds attached, gave judgment accordingly, and the defendants, M. De Lizardi & Co., appealed.

Preston, for the plaintiffs, insisted :

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1. That the arrangement between the plaintiffs and Tolmé & Co. was such, that they became *jointly interested* in the purchase of exchange, and that the funds attached belonged to the partnership and joint account, and were not liable to attachment, except first subject to a liquidation of partnership. *Louisiana Code*, 2794.

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2. As soon as a bill or draft was remitted by Tolmé & Co., it became the property of the plaintiffs, arising by express or implied contract, which could not be taken from them by Tolmé & Co., much less by third persons. Wilson & Co. had a right to have the proceeds applied to the payment of their debt, because it was so contracted before the attachment. This case is precisely similar to that of *Armor vs. Cockburn*, 4 *Martin*, 668; and cannot be distinguished in principle from the case of *Babcock vs. Maltbie*, 7 *Martin*, N. S., 138.

3. The drafts being negotiable, payment was to be made to Merle & Co., who were the holders, and received payment for Wilson & Co., who alone had the right to receive it. Tolmé & Co. had no longer any power or control over them and could not either demand or receive payment. *Gray vs. Trafton et al.*, 12 *Martin*, 707.

Benjamin, for the defendants and appellants.

Bullard, J., delivered the opinion of the court.

The plaintiffs, bankers of London, represent in their petition that C. D. Tolmé & Co., of the Havana, being largely indebted to them, remitted at different times, between the 1st of November, 1836, and the 1st of April 1837, to John A. Merle & Co., who were the plaintiffs' agents, a number of drafts amounting to upwards of sixty thousand dollars, for collection, and directed the proceeds to be remitted to them. That Merle & Co. received these drafts, as the agents of the plaintiffs, and undertook to hold them, on their account, until they should mature, and to collect and remit their proceeds to them in London, and that by means of the premises the plaintiffs became the owners of said drafts and the proceeds

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thereof. They allege that there is now in the hands of Merle & Co. sixteen thousand and thirty dollars and sixty-five cents belonging to them, but which they refuse to pay over, alleging that the same had been attached in their hands by Lizardi & Co., the Citizens' Bank, and others, as the property of C. D. Tolmé & Co., and for debts due by them to the attaching creditors. They pray for an injunction, restraining Merle & Co. from disposing of the funds, and that the same may be declared to belong to them in preference to the attaching creditors, and that they may be condemned to pay damages, &c.

J. A. Merle & Co. answer, that they have in their hands a certain sum of money, and a note for seven thousand five hundred dollars, which they believe belong of right to the plaintiffs, but that the same having been attached as the property of Tolmé & Co., they hold it subject to the final order of the court. The attaching creditors answer by a general denial.

The plaintiffs have certainly failed to prove, that J. A. Merle & Co. were their agents, or that there was any privity between them, or that they had come under any positive engagement to pay over the funds to the plaintiffs. They were, on the contrary, the agents of Tolmé & Co., and received large amounts of bills of exchange, with instructions to cash them and remit the proceeds in sterling bills to the plaintiffs in London. The question, therefore, which the case presents is, whether the bills of exchange remitted by the house in the Havana, or the proceeds of them before they were remitted, became the property of Wilson & Co., and were placed beyond the reach of the creditors of Tolmé & Co.

The course of dealing between the plaintiffs and Tolmé & Co., appears to have been in exchange on joint account. The latter were authorized to draw on the plaintiffs for twenty thousand pounds sterling on joint account, and to be covered by remittances either direct or through certain houses in the United States, designated by Wilson & Co., in their correspondence. The firm of J. A. Merle & Co., is not among those indicated by the plaintiffs. The account kept

by Tolmé & Co. was styled, "joint exchange account with T. Wilson & Co., of London," in which "joint exchange" was debited with the amount of remittances made through different houses in the United States and directly to Wilson & Co., and credited by the amount of bills drawn by Tolmé & Co. on the plaintiffs. The remittances of bills of exchange to J. A. Merle & Co., were made with orders to collect and remit in sterling bills to Wilson & Co. It appears to us clear, that if the parties to any bills thus remitted for collection had failed after they came into the hands of Merle & Co., the loss would not have fallen upon the house in London. They were still at the risk of Tolmé & Co., or perhaps of the joint exchange account, but certainly not of Wilson & Co. It does not appear that J. A. Merle & Co., were acquainted with the partnership existing between those two houses. Their correspondence was with the Havana house; the bills of exchange were received as the property of Tolmé & Co., with orders to collect and remit the proceeds to Wilson & Co. The name of the latter house was not known in the transactions, so far as it appears, except as entitled, finally, to receive the proceeds, which were to be remitted with guaranty. Under these circumstances, we are of opinion that those effects in the hands of J. A. Merle & Co., were liable to be attached by the creditors of Tolmé & Co.

But it is contended by the counsel for the appellees, that Wilson & Co. and Tolmé & Co. were partners, and that the funds and bills attached belonged to the partnership, and that they were not liable to attachment, except subject to the liquidation of the partnership concerns.

These pretensions are totally different from those advanced in the petition. Tolmé & Co. are therein treated as the debtors of the plaintiffs, not as their partners, and the fund itself as having become the separate property of the plaintiffs. Admitting that such an inquiry could be gone into in this case, it is by no means clear, that even as between the parties themselves, the bills of exchange remitted to Merle & Co. belonged to the partnership. As it relates to third persons, they were upon their face the property of Tolmé & Co., as

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Where the plaintiff's debtor placed drafts in the hands of an agent for collection, with orders to collect and remit the proceeds to the plaintiff; and in the meantime another creditor attached these funds in the hands of the agent. *Held*, that the attachment is good, and that the funds are liable to be attached by other creditors until placed beyond their reach by remittance.

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much as if it had been a shipment of coffee to the same agent, with directions to sell and remit the proceeds to Wilson & Co. Wilson & Co. cannot show themselves to be creditors of Tolmé & Co., on account of partnership operations, until the concern has been liquidated, and the case presents no conflict between the separate creditors of one partner and the creditors of the firm.

Upon the whole, we conclude that the court below erred in considering the funds in the hands of J. A. Merle & Co., as belonging exclusively to the plaintiffs, and in decreeing accordingly.

The judgment of the District Court is, therefore, reversed, and ours is for the defendants, with costs in both courts.

VARION ET AL. VS. DUPEYRE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it is shown that workmen refused to work by the job, the jury may allow their account for materials and work done, or so much as they think right, from all the circumstances and testimony adduced.

When there is no formal delivery of work, if it is shown that the owner called for a detailed statement of what had been done, and said his negroes would finish the balance, it will be sufficient to charge him, and release the workman from a formal delivery.

This is an action on an account for work and labor done and materials furnished, in the repair of a floating wharf. The defendant denied generally, and averred that he once contracted with the plaintiffs to do some repairs on a floating wharf, but on the condition that it should not cost more than three hundred dollars; that they afterwards done some work on it, and offered to take a less sum than now demanded,

which he refused to give ; and also that they never finished and delivered the work. There were several witnesses examined, who proved the work charged to have been done ; but there was no formal delivery shown, or that the work was completely finished. One or two witnesses said the defendant called for the plaintiffs' account after the wharf was launched, and said he would finish it with his negroes.

There was a verdict for the plaintiffs, and from judgment thereon the defendant appealed.

R. Hunt, for the plaintiffs.

Canon, contra.

Morphy, J., delivered the opinion of the court.

This was a suit brought for four hundred and fifty-five dollars and eighty-two cents, on an open account for labor and materials furnished in the repair of a floating wharf belonging to the defendant. The latter, after pleading the general issue, averred that he contracted with plaintiffs for the repair of said wharf, provided that it would not cost more than three hundred dollars ; that before finishing the work, the plaintiffs abandoned it, and never made a delivery of the same to defendant, who was obliged to have other floating wharves constructed, which cost him only three hundred dollars each. The case was submitted to a jury, who found in favor of the plaintiffs for the amount claimed ; having failed in a motion for a new trial, the defendant appealed.

No special agreement has been shown for the repairs made by plaintiffs. It is proved, on the contrary, that they refused to undertake the work by the job, not being able at that time to ascertain the extent of the necessary repairs. It was agreed that the floating bridge should be brought by defendant to the yard of the plaintiffs, on the other side of the river, there to be hauled ashore and repaired. The charges set forth in the account annexed to plaintiffs' petition, are admitted by all the witnesses to be correct, and such as are usually made. No formal delivery of the work appears to

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Where it is shown that workmen refused to work by the job, the jury may allow their account for materials and work done, or so much as they think right, from all the circumstances and testimony adduced.

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When there is no formal delivery of work, if it is shown that the owner called for a detailed statement of what had been done, and said his negroes would finish the balance, it will be sufficient to charge him, and release the workman from a formal delivery.

have been made to defendant ; but the clerk of the plaintiffs testifies, that as soon as the floating wharf was launched into the river, after undergoing an almost thorough repair, the defendant called upon him for a detailed account of the work done and materials furnished ; and he (the witness) understood that the defendant himself was to finish whatever little remained yet to be done. Another witness heard defendant say that his negroes would finish the work ; the testimony is somewhat contradictory as to what remained yet to be done, to render the repair complete, and as to the time when, according to usage, the work should be considered as delivered. From the whole the jury seem to have concluded, (and we cannot say they erred,) that defendant having undertaken to finish the work, and called for the bill of the repairs done by plaintiffs, relieved the latter from the necessity of making any delivery ; and that having thus taken charge of the wharf, it was at his risk from that moment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the plea of forgery is put in, supported by the oath of the party, it requires much stronger evidence to authorize a recovery, than in the ordinary case of a general denial.

So, where the defendant expressly averred on oath, that his signature to the note sued on was a forgery, proof, by witnesses, who had not seen him sign, but who only express their belief of its genuineness, from its similarity to signatures which *they had seen*, is insufficient to support the verdict of a jury.

This is an action against the defendant on his promissory note, purporting to be signed by him, and made payable to the order of the plaintiff, for the sum of six thousand two hundred dollars. The note is dated at New-Orleans, May 2d, 1838. The defendant pleaded a general denial, and expressly averred that his signature was a forgery, to which he made affidavit. Upon these pleadings and issues, the cause was submitted to a jury.

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The first witness called by the plaintiff, swore that he was acquainted with the parties, had done business with the defendant, and had frequently seen him write and sign his name; on being shown the note, says he would not be positive as to the body of the note, "but as to the signature, it is the defendant's; he should take it to be his; his writing is not always uniform."

Other witnesses, who had seen the defendant write and sign his name, testified that they believed the signature to be genuine, and would have taken the note in the belief that it was so.

It was in evidence that the plaintiff had drawn a note to the defendant's order, which he endorsed in the presence of a witness, who states he *believes* the signature to this note is that of the defendant.

It was not shown on what account the note was given, but it was shown that the plaintiff and defendant had been joint owners of the schooner F. Arnet, and in business together in 1836 and 1837. The former sold out his interest in the schooner to defendant, for a valuable consideration. A witness for defendant, states that he had seen a note on which the plaintiff, Robinson, signed the name of the defendant, and came to witness' notarial office, to see if he had authority to do so: "The signature was pretty well imitated, and looked very like the defendant's."

The jury returned a verdict for the plaintiff; and after an unsuccessful effort to obtain a new trial, from judgment confirming the verdict, the defendant appealed.

Hennen, for the plaintiff.

Roselius, contra.

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Where the plea of forgery is put in, supported by the oath of the party, it requires much stronger evidence to authorize a recovery, than in the ordinary case of a general denial. So, where the defendant expressly averred, on oath, that his signature to the note sued on was a forgery, proof, by witnesses who had not seen him sign but who only express their belief of its genuineness, from its similarity to signatures which they had seen, is insufficient to support the verdict of a jury.

Morphy, J., delivered the opinion of the court.

This suit is brought on a note of six thousand two hundred dollars, payable to plaintiff on demand. The defendant denied having subscribed such note, and averred, under oath, his signature to it to be a forgery. The case was tried by a jury, who gave their verdict in favor of plaintiff. After having vainly attempted to obtain a new trial, the defendant appealed.

The evidence we find in the record, would, no doubt, fully justify the verdict in the ordinary case of a general denial; but, when a plea of forgery is made, and supported by the oath of the party, it appears to us that much stronger evidence should be required. The proof, by witnesses who have not seen a person write or sign, and who only express their belief or knowledge of the genuineness of the signature in dispute, from its similarity and likeness to signatures of the same person which they have seen, has always, in itself, something rather vague and unsatisfactory, if not corroborated by circumstantial evidence. It might be said to show the accuracy and perfection of the counterfeit, as much as the genuineness of the signature sought to be proved. A plea of forgery necessarily involves that of a want of consideration; and when a controversy of this kind arises between the original parties to a due bill, it is not, perhaps, exacting too much of the party claiming its amount, to require or expect that he should corroborate the ordinary proof of the signature by some evidence of the consideration given for it. Although this note is for a large amount, considering the situation and means of the individuals, as disclosed by the evidence, and although it is not in a negotiable form, the record does not give us the least insight into the circumstances under which it was subscribed by the defendant. No dealings between these persons are shown, which could have produced this indebtedness, except a partnership which formerly existed between them for a small schooner, but which has ceased, and appears to have been settled.

Upon a full examination of the whole record, the evidence has appeared to us rather weak, in a case of this kind, and

has left doubts in our minds as to the correctness of the verdict. We have thought it best to have the case submitted to a second jury. This course will afford both parties the means of introducing additional evidence, and will probably promote the ends of justice, by removing all doubts in the matter.

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VS.

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It is, therefore, ordered that the judgment of the District Court be avoided and reversed, and that this case be remanded for a new trial; the costs of this appeal to be borne by the plaintiff and appellee.

HART ET AL. VS. WINDLE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

When the plaintiff, by a special endorsement, parts with his interest to another, he must show his title by a re-transfer. Mere possession of the note is not sufficient.

Where the endorsee is merely the agent of the plaintiff, the latter may sue in his own name. But such fact cannot be presumed; it must be alleged and proved.

So, in this case, it was alleged that the special endorsement of the plaintiff to G., was for the purpose of collection; but the fact was not proved, and the presumption resulting from possession, is insufficient.

This is an action against the maker of the following promissory note:

"\$1248 50

NATCHITOCHES, July 15, 1838.

"Twelve months after date, I promise to pay to the order of Michael Colgan, the sum of one thousand two hundred and forty-eight dollars and fifty cents, for value received, negotiable and payable at the Branch of the City Bank of New-Orleans, at Natchitoches."

"HENRY WINDLE."

Endorsed.

"M. COLGAN." Pay W. GREENEWALT, or order."

"HART, LABAT & Co."

"W. GREENEWALT."

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The plaintiffs allege that said note was by them endorsed over to W. Greenewalt, for the purpose of collection, and placed by him in the Branch of the City Bank at Natchitoches for that purpose, and was protested for non-payment; he prays that the defendant be held to bail and condemned to pay the amount.

The defendant pleaded a general denial. The plaintiffs offered the protest and note in evidence, and proved the signature of the payee and first endorser, and had judgment against the defendant, and he appealed.

L. Janin and Johnson, for the plaintiffs, prayed affirmance of the judgment with damages; and relied upon the case of *Hill et al. vs. Holmes & Smith*, 12 *Louisiana Reports*, 97.

Ives and I. W. Smith, for the defendant, insisted,

1. That there should be judgment of non-suit for the defendant, because there was no evidence of the endorsement of W. Greenewalt.

2. There was a special endorsement to Greenewalt, which made it necessary to prove his signature, which was not done.

Bullard, J., delivered the opinion of the court.

This is an action against the maker of a promissory note by the endorsees. The note was made payable to Colgan or order, and endorsed by him in blank. It bears also the subsequent special endorsement of the present plaintiffs to W. Greenewalt. The plaintiffs allege that this last endorsement was made merely for the purpose of enabling Greenewalt, as their agent, to collect the note at maturity for their benefit, and that it was by him placed for collection in bank, and protested.

It was said by this court, in the case of *Dicks vs. Cash et al.*, 6 *Martin, N. S.*, 45, that if it appeared that the endorsee was merely the agent of the petitioners, the decision would have been different, but that such fact could not be presumed. The general rule is undoubtedly, that where the endorsement is a special one, the plaintiffs must show their title by a

re-transfer. Mere possession of the bill is not sufficient. 7 EASTERN DIST.
Martin, N. S., 254; 2 *Louisiana Reports*, 193. April, 1840.

In this case the allegation that the note was endorsed by the plaintiffs, merely for collection, is not proved. The presumption resulting from the possession of the note is insufficient. LAWRENCE
VS.
BURTHE ET AL.

The judgment of the Commercial Court is, therefore, reversed, and ours is for the defendant, as in the case of a non-suit, with costs in both courts.

LAWRENCE VS. BURTHE ET AL.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where an act of sale contains the clause *de non alienando*, any sale or transfer made in violation of it is, *ipso jure*, void, as it relates to the first vendor or creditor.

The first vendor, who sells with the clause *de non alienando*, may have the property on which his mortgage rests seized and sold, as if no change had taken place; and without notifying or making the vendee of his mortgagor a party.

This case comes up on an injunction to stay executory proceedings.

The defendants, D. F. Burthe and L. S. Hilligsberg, sold ten lots of ground in New-Orleans, among others, to R. Hagan, the 5th of March, 1836, the price payable by instalments, for which notes were given, and the usual mortgage retained, with the clause *de non alienando*, by which the purchaser bound himself neither to alienate or encumber said property. Hagan sold these lots to the present plaintiff. On the 24th of May, 1839, after several of the notes given

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by Hagan to Burthe and Hilligsberg became due, and protested for non-payment, they took out an order of seizure and sale against said lots, without notifying Lawrence, the last purchaser and third possessor, or making him a party.

Lawrence made opposition, and obtained an injunction to stay proceedings, on the following grounds :

1. The defendants were not entitled to an order of seizure, but should have proceeded by the hypothecary action against the third possessor, if the property was subject to their mortgage.

2. There is no authentic evidence that the plaintiff assumed Hagan's mortgage.

3. Even if he had assumed Hagan's obligations, still suit should have been brought against him, and not Hagan ; or against both.

4. The thirty days notice and demand of the original debtor, and ten days notice to the third possessor, are not alleged and shown.

5. The whole proceedings are irregular and void on the face of them.

The opposition and injunction were tried summarily, on a rule taken on the plaintiff; the opposition was overruled and the injunction dissolved. The plaintiff appealed.

Roselius and Eyma, for the plaintiff and appellant, urged the grounds on which the injunction was obtained, for the reversal of the judgment.

V. Burthe, for the appellees.

Morphy, J., delivered the opinion of the court.

The plaintiff is appellant from a decree dissolving and setting aside an injunction previously obtained, to prevent the sale of twelve lots of ground, situated in suburb St. Mary. These lots had been sold to the plaintiff by Richard Hagan, who had purchased them himself from the defendants, at whose instance an order of seizure and sale had issued, under the mortgage reserved by them as vendors of said lots.

The grounds of injunction in the inferior court were, in substance, that the defendants had not pursued all the steps and formalities required for the exercise of the hypothecary action; and that the plaintiff was not made a party to the executory proceedings, although in possession of the mortgaged premises. It does not appear to us that the judge below erred. R. Hagan, the mortgagor, bound himself not to alienate or mortgage the property to the prejudice of his vendors and mortgagees. The well known effect of the clause *de non alienando*, is that any alienation or transfer, made in violation of it, is *ipso jure* void, as it relates to the creditor. The latter is not bound to pursue a third possessor by the hypothecary action, but may have the property mortgaged seized and sold, as if no change had taken place in its possessors, and being under no obligation to make the vendee of his mortgagor a party to the proceedings. 2 *Martin*, N. S., 32, *Nathan vs. Lee*; 1 *Louisiana Reports*, 29, *Donaldson vs. Mourier*; 13 *Idem.*, 314, *Nicolet's Executor vs. Moreau et al.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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Where an act of sale contains the clause *de non alienando*, any alienation or transfer made in violation of it is, *ipso jure*, void, as it relates to the first vendor or creditor.

The first vendor, who sells with the clause *de non alienando*, may have the property on which his mortgage rests, seized and sold, as if no change had taken place, and without notifying or making the vendee of his mortgagor a party.

VALETTI VS. ALPUENTE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where an act of sale of mortgaged property is not recorded in the office of the Register of Conveyances, the original vendor has the right to act and to proceed against the mortgaged property in the hands of the third possessor, as if it was still the property of the mortgagor.

This is an opposition and injunction by a third possessor to stay an order of seizure and sale, which the original vendor

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had obtained against the mortgaged property for the payment of the original price.

The plaintiff shows that he purchased several lots in new faubourg Marigny, from one N. Rillieux, in September, 1837, who bought the same from F. Alpueute, by notarial act with mortgage in June, 1836; and that Alpueute had obtained an order of seizure against said property, without pursuing the form prescribed by law, and was proceeding to sell it. He made opposition and obtained an injunction to stay the executory proceedings on executing bond with security.

The defendant took a rule to have the injunction dissolved, on several grounds, with damages and costs.

On the trial of the rule, it appeared from the certificate of the Register of Conveyances, for the city and parish of New Orleans, that the act of sale from Rillieux to the plaintiff, Suppo de Valetti, had not been registered in his office, so as to give it effect against third persons. There was judgment on the rule, dissolving the injunction, with twenty per cent. damages, and overruling the opposition. The plaintiff appealed.

Pepin, for the plaintiff and appellant.

Morel, contra.

Bullard, J., delivered the opinion of the court.

The appellant having made opposition, as a third possessor, to the order of seizure and sale, on the ground that the plaintiff had not pursued the forms required in cases where the property mortgaged had passed into the hands of third persons, and, having obtained an injunction to stay further proceedings, a rule was taken on him to show cause why the injunction should not be dissolved and the opposition overruled, on the ground that this pretended title to the property had never been recorded in the office of the Register of Conveyances. The rule was made absolute, and the injunction having been dissolved with damages and costs, the plaintiff appealed.

A certificate of the Register of Conveyances shows that the sale from Rillieux to De Valetti, of lots in the suburb Marigny, had not been recorded in his office. The act of the Legislature of 1827, creating that office declares, that conveyances not registered therein shall have no effect against third persons. Until such recording, the mortgagee had a right to act as if the lots were still the property of the mortgagor.

To that it is answered that the lots appear, by a copy of the act in evidence, to be situated in the *new* faubourg Marigny, and not in faubourg Marigny, and consequently the certificate of the register is insufficient and inapplicable. If the certificate left it doubtful, the party claiming the benefit of his conveyance might have shown that his title had in fact been registered. This he has not chosen to do, and we must take the certificate as applying to any faubourg Marigny, if there be more than one, of which we are not judicially informed.

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VS.

SHERWOOD.

Where an act of sale of mortgaged property, is not recorded in the office of the register of conveyances, the original vendor has the right to act and to proceed against the mortgaged property in the hands of the third possessor, as if it was still the property of the mortgagor.

The judgment below, is, therefore, affirmed with costs.

DELAFIELD ET AL. VS. SHERWOOD.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The testimony of several witnesses, who swear positively to a transaction and discharge of the defendant from the debt, sought to be enforced, will outweigh the testimony of a single witness to the contrary, who was not present all the time of the transaction.

This is an action against the *drawee* of a bill of exchange, drawn at Cincinnati, the 9th of August, 1838, by Channing Richards, in favor of and endorsed by Wolcott Richards, for four thousand dollars, payable three months after date. It was addressed to the defendant in New-York, and never accepted, but protested at maturity for non-payment.

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There was a supplemental petition, alleging that the defendant had not been found on the process which issued on the first petition, but that he had since made a payment on said draft, leaving still a balance due of one thousand three hundred and fifty-six dollars. They pray for an *alias writ* of arrest and judgment.

The defendant resisted payment, and pleaded a discharge by the plaintiffs in Cincinnati, where he had been sued and arrested for the same debt.

There was a variety of testimony, and some of it contradictory; but several of the witnesses, and among them the sheriff and his deputies in Cincinnati, in whose office the transaction and discharge took place, swore positively to this fact.

There was judgment for the defendant, and the plaintiffs appealed.

Peyton, for the appellants.

L. C. and G. B. Duncan, contra.

Martin, J., delivered the opinion of the court.

The plaintiffs are appellants from a judgment rendered against them, on the ground that a settlement and discharge of the defendant's liability on the draft, took place subsequently to the institution of this suit.

The question presented is one of fact simply. The present suit was brought the 6th of February, 1839. On the 23d of the same month, the defendant was arrested in Cincinnati, on the same claim; and the settlement and discharge on which he relies is testified to have taken place on the same evening, by the sheriff who had arrested him, his two deputies, and a gentleman whom he had sent for to become his bail. The testimony of these four witnesses is perfectly concordant and explicit. They all positively depose, that the plaintiff (De lafield) agreed, in consideration of the sum of three thousand dollars then received, to discharge the defendant absolutely from the debt; and declined to give a

written discharge, only from an apprehension that he might thereby lose his claim or recourse against another party to the draft, for the balance. All this took place in the sheriff's office, where the defendant was detained until this settlement and discharge was effected. This took place on a Saturday evening. The plaintiffs rely on the testimony of Vaughan, the attorney employed to bring the suit. This witness was in the sheriff's office for a short time only after the arrest of the defendant, and before the settlement and discharge took place, to which the other witnesses have testified. He, however, swears, that on the Monday following, the plaintiff thought of arresting the defendant a second time, and applied to witness, his former attorney, who declined. A suit was brought by another attorney, and discontinued. The witness further says, that on the same day the defendant, who had a northern draft for about five thousand dollars, offered to plaintiff seven hundred dollars for an absolute discharge, as he was anxious to close the matter; provided, he would give him the cash for the balance. This was refused.

It does not appear to us that the district judge erred in concluding that the testimony of four witnesses fully established the settlement and discharge of the defendant; and could not be outweighed by that of the plaintiffs attorney, who was not present all the time when the discharge was granted.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

DEFAU ET UX. VS. PELANE.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

A sum due the defendant by the husband, cannot be pleaded in compensation of the wife's demand in her own right.

Parole evidence was properly rejected of the husband's consent to lose three per cent. per month, on a note due to and the sole property of his wife.

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This is an action by the husband and wife to recover from the defendant a promissory note for six hundred dollars, taken for part of the price of a slave, the dotal property of the wife, and which her husband had put into the defendant's hands to get discounted.

The defendant pleaded a general denial, except such allegations as were expressly admitted; and averred that Defau, the husband, had put the note in question into his hands for discount, and authorized him to discount it at a loss of two hundred and sixteen dollars; that the plaintiff, Defau, is the owner of said note, and owes him two hundred and seventy dollars, leaving a small balance, which he is and always has been ready to pay. The defendant pleads the sum of two hundred and seventy dollars in compensation.

The evidence showed that the note was the exclusive property of the plaintiff's wife, and had been by him put into the defendant's hands to get discounted. The judge presiding rejected parole evidence offered by the defendant to prove that the plaintiff agreed to lose three per cent. per month on the note, and gave judgment for the plaintiffs, that they recover of the defendant the amount of said note, or the note itself; and he appealed.

C. Janin, for the plaintiffs.

Latour, for the appellant.

Morphy, J., delivered the opinion of the court.

The petition states that a note of six hundred dollars belonging to Charlotte Irma Latour, wife of J. U. Defau, was at the request of defendant placed in his hands to be discounted; but that the latter has not accounted for the proceeds thereof, and refuses to return said note; thus rendering himself liable to the owner aforesaid, for its full amount. The defendant avers, that a note similar to the one described in the petition was handed to him by J. U. Defau, with a request to have the same discounted at a loss of two hundred and sixteen dollars, with which defendant complied; that Defau was the owner of said note, and was indebted

to him in the sum of two hundred and seventy dollars, which amount it was agreed should be paid out of the proceeds of the note, and for which he pleads compensation; that as to the balance of one hundred and fourteen dollars, remaining after these deductions, he has always been ready and willing to pay the same, but that said Defau has refused to receive it. The plaintiffs had a judgment, from which the defendant has appealed.

The evidence shows conclusively that the note in question was the property of Charlotte Irma Latour, as having been received by her in part payment of some property of her's which she had sold. The defendant has not been able to give any proof that he succeeded in the negotiation of the note entrusted to him; if he had, no sum due to him by Defau could have been set off against the claim of his wife as owner of this note. The judge below decided correctly, we think, in rejecting parole evidence of Defau's consent to lose three per cent. per month on the note defendant had undertaken to have discounted; no negotiation having been proved, the note must be presumed to be yet in the defendant's possession, and the interest exacted for his own account. He must then pay the amount of the note, or give up the note itself to the true owner. The appellees have prayed for damages for the frivolous appeal. We cannot perceive on what ground the appellant could have entertained a reasonable hope of success in this court. His object must have been delay.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed, with costs and ten per cent. damages.

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VS.

PELANE.

A sum due the defendant by the husband cannot be pleaded in compensation of the wife's demand in her own right.

Parole evidence was properly rejected of the husband's consent to lose 3 per cent. per month, on a note due to and the sole property of his wife.

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BANK OF ORLEANS vs. WHITTEMORE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

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WHITTEMORE.

An affidavit for a continuance, on account of the absence of a witness, which does not state that his departure was unknown to the affiant and his testimony could not be had, is insufficient.

Where a special defence is set up, it may be considered a waiver of the plea of the general issue.

This is an action against the makers and the endorsers of a promissory note, drawn to the order of and endorsed by the firm of Whittemore, Blair & Co.

The defendants, Whittemore & Blair, severed in their answers, and pleaded a general denial; and Whittemore set up a special defence, averring that the endorsement of his late firm was made after its dissolution, without his consent, and is not binding; that plaintiff has released A. B. Bein, one of the original parties as maker of the note, by which he is discharged. There was no trial as to R. Bein, the maker and one of the endorsers. Blair made no defence on the trial. Whittemore failed to make out his special defence, but moved for a continuance on the score of absence of a material witness. He omitted to state in his affidavit that this person departed without his knowledge, and that he was unable to obtain his testimony, and the continuance was refused; a bill of exception taken, and judgment given for the plaintiff; from which the defendant, Whittemore, appealed.

L. Peirce, for the plaintiff.

Greiner, contra.

Morphy, J., delivered the opinion of the court.

This is a suit brought against R. Bein, as drawer, and Whittemore, Blair & Co., as endorsers, of a promissory note held by plaintiff. Whittemore, the present appellant, made a separate answer, setting up for special defence that the note sued on was given long after the time it was dated, and long

after the dissolution of the firm of Whittemore, Blair & Co. had taken place; and that the endorsement of Whittemore, Blair & Co. was placed on said note without his consent; that all these facts were well known to the plaintiff, who moreover released the defendant from the payment of this note, by taking upon itself, without defendant's consent, to discharge from all responsibility A. B. Bein, for whom the defendant, if liable at all, was responsible as endorser or surety jointly with the other persons sued with him in this case. Judgment was rendered against the defendants, and Whittemore appealed.

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The record furnishes no evidence whatever in support of the defence set up by the appellant; but our attention is drawn to a bill of exceptions to the opinion of the judge below, who refused a continuance asked for by defendant, on the score of the absence of a witness. It was expected to prove by this witness that the notice of protest was left at the store of the assignees of Blair & Lawes, and not at the store of Whittemore, Blair & Co., as stated in the notary's certificate. We think that the judge did not err. Independent of the insufficiency of the affidavit, which does not state that affiant did not know of the departure of the witness, and could not have obtained his testimony, it appears from the evidence that at the dissolution of the firm of Whittemore, Blair & Co., the new firm of Blair & Lawes was entrusted with the liquidation of their affairs, and that Blair, one of them, had promised to pay. The special defence set up by the appellant might, moreover, be considered as a waiver of the general denial.

An affidavit for a continuance, on account of the absence of a witness; which does not state that his departure was unknown to the affiant, and his testimony could not be had, is insufficient.

Where a special defence is set up, it may be considered a waiver of the plea of the general issue.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

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vs.
DOANE.

MALONEY vs. DOANE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

An action of damages for malicious prosecution and false imprisonment, should not be maintained without clear proof of *malice* and the *absence* of probable cause of guilt.

Whether the defendant disclosed the grounds of his belief in his affidavit, charging the plaintiff with a criminal offence, is immaterial. In an action of damages for malicious prosecution, &c., he will be permitted to show his motives, and the absence of malice.

This is an action of damages, for malicious prosecution and false imprisonment.

The plaintiff charges the defendant with having, on the 14th July, 1836, maliciously, wickedly, and with the intention of injuring him, in his good name and character, caused him to be imprisoned for a long time, on a false and groundless charge of harboring his slave. That with a view to oppress and injure him, the said defendant, without any reasonable or probable cause, went before the Recorder of the Second Municipality and made oath, that your petitioner enticed away and harbored his (defendant's) slave, by reason of which he was imprisoned for the space of five months, at the expiration of which time he was fully acquitted of said offence and duly discharged. He alleges, that by reason of said oppression, injury, and imprisonment, he has suffered damage in his credit, character, business and expenses, to the amount of five thousand dollars; and to obtain redress, he prays for a trial before a jury, and that the defendant be condemned to make reparation in damages.

The defendant admitted, he had charged the plaintiff with enticing away and harboring a certain negress slave belonging to him, but denied that the charge was maliciously or wickedly made, and without any probable cause; that he had at the time, and still has, good reasons for believing that his slave had been enticed away and harbored, as charged against the plaintiff. He sets up a demand in reconvention,

on the ground that this suit is vexatious and intended to harrass him, and prays that the plaintiffs' demand be rejected, and that he have judgment over against him for one thousand dollars in damages.

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Upon these pleadings and issues the parties went to trial.

The proceedings before the Recorder, arresting and imprisoning the plaintiff, were read in evidence, together with an anonymous letter which had been filed in these proceedings by the defendant, on procuring the arrest. At the foot of the writ of commitment was written a *discharge*, five months afterwards, and signed by the clerk of the Criminal Court.

The anonymous letter purported to be addressed to one Jones, at the corner of Campana and Juliet streets, charging him with cruelly whipping and maltreating the servant girl Eliza, who appears to be the one charged with being harbored by the plaintiff. This letter was found under the defendant's door, who, it appears was owner of the slave in question. The letter states that she was out of his reach and he had better sell her as she was; that there were friends who would buy her, to get her clear of bad treatment, &c. The defendant offered two witnesses, who told him before he arrested the plaintiff, they had seen the plaintiff write, and knew his hand-writing, and that this anonymous letter was in his hand-writing, and which induced him to proceed against plaintiff. His counsel objected to this evidence, because no such grounds of belief or inducement were set forth in the defendant's affidavit before the Recorder, in order to obtain the plaintiff's arrest and commitment. The court rejected the testimony and the defendant's counsel took a bill of exceptions. He also took exceptions to the charge of the judge to the jury.

There was a verdict and judgment of five hundred dollars for the plaintiff, and the defendant appealed.

Worthington, for the plaintiff, urged the affirmance of judgment.

F. B. Conrad, contra, insisted that judgment must be reversed.

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1. The court erred in refusing to charge the jury that the plaintiff was not entitled to a verdict, unless he showed an acquittal by a jury from the charge upon which he was prosecuted. He had alleged an acquittal in his petition; and the allegation and proof in support of it, are absolutely necessary to entitle him to a verdict. A *nolle prosequi* by the Attorney General, even had it been proved, is not sufficient. 2 *Starkie on Evidence*, 907; *ibid.*, 918; 2 *Phillips on Evidence*, 111; 1 *Salkeld's Reports*, 21.

2. There was error greatly to the injury of the defendant, in rejecting the testimony of witnesses, as to the information they gave defendant, *prior to the prosecution*. The evidence should have gone to the jury for the purpose of rebutting the inference of malice, and to show probable cause. 2 *Starkie on Evidence*, 915; *ibid.*, 921-2. See case of *Snow vs. Allen*, 2 *English Common Law Reports*, 485.

3. The court also erred in refusing to charge that the judgment of the Recorder, remanding the plaintiff for his trial on the charge was, in the absence of an acquittal, conclusive, at least as regards the questions of malice and want of probable cause. 15 *Massachusetts Reports*, 243.

4. That the verdict is clearly contrary to law and the evidence. Such an action cannot be maintained, unless malice and want of probable cause be clearly established. Both must be proved by the plaintiff. If such a prosecution be commenced through malice on the part of the prosecutor, but he had probable cause for his charge, the action cannot be sustained. On the other hand, if he had no probable cause, and acted not maliciously, but ignorantly, still there is no claim for damages. 2 *Washington, C. C. Reports*, 463; 3 *ibid.*, 36; 9 *East*, 361; 2 *Starkie's Evidence*, 913; 2 *Phillips' Evidence*, 113; 5 *Louisiana Reports*, 318. There is no proof of malice in the record, and the inference is rebutted by abundant proof of probable cause.

Bullard, J., delivered the opinion of the court.

The plaintiff alleges, that the defendant, contriving and wickedly and maliciously intending to injure him, and with-

out any reasonable or probable cause, charged him on oath before the Recorder of the Second Municipality, with having enticed away and harbored a slave belonging to him. That he was in consequence arrested and kept in prison for a long time, and finally duly discharged and fully acquitted of said offence. He claims five thousand dollars damages for such malicious prosecution and false imprisonment. There was a verdict for the plaintiff for five hundred dollars, and the defendant appealed.

The defendant admitted that he instituted a prosecution against the plaintiff for enticing away and harboring his female slave, but he denies that he was actuated by malice, but avers that he had sufficient probable cause.

The public interest and the proper administration of justice in criminal matters, require that such actions as the present should not be maintained without clear proof of malice and the absence of probable cause.

The court, in our opinion, erred in refusing the defendant permission to prove, by two witnesses, that they had stated to him, before he instituted the prosecution against the plaintiff, that a certain anonymous letter, which had been read in evidence by plaintiff's counsel, was in their opinion in the hand-writing of the plaintiff. Such evidence was objected to on the ground that no such grounds of belief were set forth in the defendant's affidavit before the Recorder. Whether the defendant disclosed the grounds of his belief or not, at the inception of the prosecution, does not in our opinion vary the case. He ought to be permitted to show his motives and the absence of malice.

Justice, we think, requires that the case should be remanded for a new trial.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, the verdict set aside, and that the case be remanded for a new trial, the appellee paying the costs of the appeal.

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An action of damages for malicious prosecution and false imprisonment, should not be maintained, without clear proof of malice and the absence of probable cause of guilt.

Whether the defendant disclosed the grounds of his belief in his affidavit, charging the plaintiff with a criminal offence, is immaterial. In an action of damages for malicious prosecution, &c., he will be permitted to show his motives, and the absence of malice.

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BRASHEAR VS. M'MASTERS ET AL.

BRASHEAR
VS.
M'MASTERS ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a promissory note is given, in consideration of the plaintiff's promise to have a certain tract of land laid off into town lots, and the share of each subscriber conveyed to him, it is a contract creating reciprocal obligations, and the plaintiff is bound to convey, or show his readiness and ability to perform his part of the contract, and, failing to do so, cannot recover on the note.

In contracts containing reciprocal obligations, the party bound to convey, must convey, or show his readiness and ability to perform his part of the contract, before he can compel the other to pay the price.

This is an action against the makers of a note for one thousand two hundred and fifty dollars. The note was given in consideration of the defendants' subscribing for one quarter of a share of a tract of land, to be divided and laid out into town lots. The agreement is headed as follows:

"We, the undersigned, agree and bind ourselves for the several sums annexed to our names, and oblige ourselves to give our individual bonds for the same, payable on the first day of January, 1838, on the following conditions, viz: Walter Brashear, on his part, and Thomas B. Warfield, attorney in fact of Barr's heirs, stipulate to convey to the undersigned, in their just proportion, all that tract of land called *Golden Farm*, situated on Berwick's Bay, containing five hundred and eighty-eight arpents, more or less, with a good and sufficient title; which tract of land is to be laid out into town lots, on such terms and conditions as a majority of the persons hereunto subscribed may determine on, and which is estimated in and by an act passed before William Boswell, notary public, on the 20th March, 1837, at the sum of fifty thousand dollars."

The land was divided into shares of five thousand dollars each. The defendants subscribed for a quarter of a share, and gave in payment their note now in suit, payable the 1st January, 1838. The agreement seems to have never been completed. All the shares were not subscribed; and there

is no evidence that the land was ever divided, the town laid off, or that the plaintiff had performed any part of the agreement, or showed any offer or disposition to comply.

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The defendants resisted payment, on the ground that the note was without consideration, and void. They prayed that the contract be cancelled, and the note given up.

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There was judgment for the defendants, and the plaintiff appealed.

Wharton, for the plaintiff.

Micou, contra.

Bullard, J., delivered the opinion of the court.

The defendants, being sued on their promissory note, pleaded that it was given as the price of certain land, which the plaintiff and one Warfield had bound themselves to convey to the respondents and others, but which agreement was, in itself, incomplete and not binding on them, and that the plaintiff had not performed, on his part, what he was bound to do, and that, consequently, the consideration has failed, and the plaintiff not entitled to recovery. They claim the right of receding from the incomplete agreement, and that the note may be cancelled and annulled.

The agreement under private signature referred to in the answer, was given in evidence, and sufficiently proves, in our opinion, that the note was given for the consideration alleged. It remains only to inquire whether that consideration was valid, and, if so, whether it has failed.

The subscribers to that instrument bind themselves for the sums affixed to their names severally, and to give their bonds for the same, payable on the first day of January, 1838. The plaintiffs, together with Warfield, acting as agent for certain other persons, stipulate on their part to convey to the subscribers, in their just proportions, a tract of land on Berwick's Bay, called the Golden Farm, to be laid out into town lots, on such terms and conditions as a majority of the subscribers might determine on, and which is estimated, in an act before Boswell, notary, at fifty thousand dollars. The whole amount does not appear to have been subscribed.

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STATE OF LOUISIANA
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NEW-ORLEANS.

In contracts containing reciprocal obligations, the party bound to convey, must convey, or show his readiness and ability to perform his part of the contract, before he can compel the other to pay the price.

We leave out of view the contract passed before Boswell, because the defendants were not parties to it; and although it creates obligations in relation to the laying out of a town on Berwick's Bay, of which the subscribers to the contract under private signature might, perhaps, claim the performance; yet it is not necessary to inquire into it in this case. The consideration for which the note was given, was clearly a portion of the tract of land which the plaintiff, jointly with Warfield, promised to convey to the defendants; and the contract created reciprocal obligations. The plaintiff was bound to convey, and the defendants to pay their share. The latter cannot be compelled to perform their part of the contract, until the plaintiff shows his readiness and ability to perform his; and there is no evidence before us that the defendants have been legally put *in mora*.

The judgment of the District Court is, therefore, affirmed, with costs.

STATE OF LOUISIANA, vs. JUDGE OF THE PARISH COURT OF
NEW-ORLEANS.

ON AN APPLICATION FOR A WRIT OF MANDAMUS.

The Judge *a quo* possesses discretionary powers of enlarging a rule, and postponing a trial, giving further time for hearing the parties; and when this discretionary power is exercised, this court will not interfere, by granting a *mandamus*, commanding him to proceed *instanter*.

This is a case of *mandamus*. Silas Lillard, a creditor, having taken a rule on the syndic of the creditors of Tarbe & Nash, to produce his bank book, and in default pay twenty per cent. damages on the money of the estate surrendered and not deposited, and be dismissed from office.

The judge refused to make the rule absolute on the expiration of the time, but allowed three days longer to produce the book, on account of sickness. The counsel of the petitioner moved that evidence be received, and offered it to show that the syndic never had kept a bank book, as required by law, and that the rule be made absolute. The judge refused to proceed in the trial of the rule, until the three days expired, and the petitioner took a rule in this court for a peremptory *mandamus* on the judge of the Parish Court, requiring him to receive the evidence, and make the rule absolute on the syndic.

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F. B. Conrad, in behalf of Judge Maurian, showed cause, that on the 10th March, 1840, Lillard took a rule for the objects specified, returnable on the 14th March, which was heard, and the following judgment rendered: "It is ordered by the court that the rule be made absolute, and that the syndic be allowed three days to file his bank book in court."

2. This delay was allowed in consequence of the sickness of the syndic. The court also considered, that according to the act of 1837, no other part of the rule could be heard but that requiring the production of the bank book; as by that law, ten days notice is required to be given to the syndic, in order to obtain his removal from office; so that, so far as his dismissal was concerned, the rule was at an end. If at the expiration of the three days allowed by the court, the syndic had failed to produce his bank book, &c., the plaintiff would be entitled to take his ten days rule on him to show cause why he should not be removed from office and pay damages, &c.

3. The plaintiff in the rule was bound to fulfil all the requirements of the statute of 1837, to entitle him to the remedy he sought against the syndic. The court considering that the plaintiff's rule of the 10th March had been disposed of, and a delay of three days given to produce the bank book; and that by the act of 1837, the syndic was entitled to ten days notice of the application to dismiss him from the syndicalship, refused to hear the motion and receive the evidence offered for that purpose.

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Greiner, for the application, insisted on the *mandamus*, and that the rule taken in this court for a peremptory *mandamus*, be made absolute.

Bullard, J., delivered the opinion of the court.

A creditor of Tarbe & Nash having taken a rule on the syndic to show cause within ten days why he should not produce the bank book, which by the act of 1837, section third, he is bound to keep; or in default thereof that he should be dismissed from the office of syndic. The same was made absolute, so far as relates to the production of the book, but three days were allowed him to produce the same, it being shown that he was sick. Before the expiration of the three days, the counsel for the creditor insisted upon his right to give evidence, that the syndic had never kept such bank book and moved for his dismissal. This being refused, he obtained from this court a rule on the judge to show cause why a *mandamus* should not issue, commanding him to receive the evidence and make the rule absolute for the dismissal of the syndic. The judge shows for cause that the part of the rule which relates to the dismissal of the syndic could not be tried until he is in default in relation to the production of the book, and that the three days allowed had not expired at the time the second motion was made.

The judge in our opinion exercised a proper discretion, in allowing the three days delay on account of sickness. It was tantamount to an enlarging of the rule and postponing the trial for that length of time, and consequently it would have been improper to have proceeded further.

Let the rule be discharged.

PUGH VS. PRIESTLY ET AL.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where partners carry on a rum distillery, and one of them who is in the habit of buying molasses for the concern, and drawing drafts on his co-partner, draws a draft for a quantity of molasses which is delivered and used, and the co-partner refuses to accept it: *Held*, that they are both liable and bound, *in solido*, for its amount.

The plaintiff alleges, that according to an agreement entered into between him and the defendants, James Priestly and Malcolm M'Nabb, he sold and delivered to them at his plantation, in the parish of Assumption, nineteen thousand nine hundred and ninety-nine gallons of molasses, at twenty-two and a half cents per gallon, amounting to four thousand four hundred and ninety-nine dollars ninety-seven cents, for which the defendant, M'Nabb, drew a draft on his co-partner, Priestly, payable sixty days after date, and which was duly protested for *non-acceptance*.

The plaintiff further shows, that the defendants were engaged as partners in a rum distillery, and that the molasses in question was delivered and used at the distillery, and that the defendants are liable, *in solido*, for the amount, according to the price agreed on, and costs of protest of their draft, for which he prays judgment.

The defendant, Priestly, pleaded a general denial. M'Nabb confessed judgment, as prayed for. There was full proof of the plaintiff's demand. The jury returned a verdict for the plaintiff, and the judge presiding rendered judgment, *in solido*, against both defendants. Priestly, alone, appealed.

Peyton, for the plaintiff, insisted that the evidence showed that the defendants were engaged together in business, and actually received and used the molasses in question. They are both liable, as charged in the judgment.

Preston and *Grivot*, contra, contended that the appellant was not bound, *in solido*, with M'Nabb, the drawer of the draft.

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ASHHURST ET AL.
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Morphy, J., delivered the opinion of the court.

This suit is brought to recover of the defendants, *in solido*, the price of a certain quantity of molasses bought of plaintiff, by M'Nabb, one of the defendants, who gave in payment for it, his draft on his co-defendant, Priestly, who refused to accept it. A general denial was filed by both defendants, but, before the day of trial, M'Nabb confessed judgment. The issue left to be tried between the remaining parties to the suit, was submitted to a jury, who gave the plaintiff a verdict, without leaving their seats. Priestly moved for a new trial, which failing to obtain, he has appealed.

The evidence shows that the defendants kept a distillery, and were in partnership for that kind of business; that the purchases of molasses were generally made by M'Nabb, who was in the habit of drawing for their payment on his partner, Priestly, as had been done in this case, and that M'Nabb's drafts were generally honored by Priestly; that the molasses for which M'Nabb gave plaintiff the draft sued on, was purchased for the account of the partnership, was delivered into their distillery, and that part of said molasses had been actually used when a difficulty arose between the defendants, which led, very shortly after, to a dissolution of the concern. With these facts spread on the record, we cannot perceive on what the appellant could build his hopes for success in this court.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

ASHHURST ET AL. VS. ADAMS ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Frivolous appeal and judgment affirmed, with maximum of damages.

This is an action by the holder against the maker and endorser of thirteen promissory notes, given for immoveable

property with mortgage. There was judgment *in solido*, EASTERN DIST.
April, 1840. with the right of enforcing the mortgage on the property, and the defendant, Adams, alone appealed.

T. Slidell, for the plaintiffs and appellees.

Macready, contra.

Bullard, J., delivered the opinion of the court.

The maker of several promissory notes is appellant from a judgment against him in favor of the holders, and the record clearly shows that the appeal was taken merely for delay.

The judgment is, therefore, affirmed, with ten per cent. damages and costs of appeal.

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DAWSON VS. DUPLANTIER.

APPEAL FROM THE COURT OF THE THIRD DISTRICT FOR THE PARISH OF
EAST BATON ROUGE, THE JUDGE OF THE DISTRICT PRESIDING.

Where the purchaser of a plantation and slaves, under mortgage for bank stock, stipulates that the seller may reserve certain slaves and he will put in others, and assumes her obligations to the bank, he cannot claim a rescission of the sale on an exception to her right to proceed against the plantation and slaves for the price, or damages in a direct action, on the ground that she (the seller) has not transferred the bank stock; until he puts her in default by showing a readiness and offer, on his part, to perform what by the contract he was first bound to do, or at least simultaneously.

When no time is fixed by a contract, within which the mutual stipulations are to be performed, either party may claim an immediate performance according to its terms, and in the mode pointed out by law for enforcing similar reciprocal engagements.

A sheriff, who is the nearest relation and son of one of the parties, is not incompetent to act and execute process in the case. It is a pecuniary interest alone, that renders him incompetent.

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A judgment by default cannot be taken by the plaintiff in an opposition and injunction to an order of seizure and sale. No answer is required; a rule taken by the adverse party to dissolve the injunction is equivalent to an answer; and such opposition and injunction are to be tried summarily.

The trial of a rule taken to set aside and dissolve an opposition and injunction staying executory proceedings, is a trial on the merits, in which the plaintiff therein is called on to support the grounds of his opposition by evidence.

This case commenced by the executory proceeding. The defendant, Madame Constance Rochon Duplantier, having sold to the plaintiff a plantation, slaves, and three hundred shares of Union Bank stock, took his seven promissory notes, payable in instalments of thirteen thousand two hundred dollars each, for the greater part of the price, secured by endorsement and mortgage on the premises, took out an order of seizure and sale, when the first note became due and was protested, for the sale of the entire premises; so much for cash as would pay the first note, and the balance on such credits as would meet the remaining notes as they became due.

The plaintiff made opposition, and obtained an injunction against this executory proceeding: First, that a main inducement to the contract, on his part, was to obtain the three hundred shares of Union Bank stock, which at the time of the purchase was worth from twenty to twenty-five per cent. per annum on the nominal amount, viz: thirty thousand dollars. The petitioner alleges, that the consideration of the notes has failed, together with that which he has paid, amounting in all to one hundred and twenty-seven thousand dollars, in consequence of Madame Duplantier failing and neglecting to transfer the bank stock, and to comply with her stipulated engagements; that he went to the Union Bank in New-Orleans, for the purpose of receiving a transfer, and to comply in good faith on his part, and at the time agreed on; but the vendor failed on her part; and that she had secured a loan of fifteen thousand dollars, for which the plantation and slaves were liable to be seized and sold. Second, that the vendor was without title to some of the slaves, and others

were afflicted with redhibitory diseases. He prays that the sale be rescinded, and that he recover back what he has paid, have his notes cancelled and given up, and five thousand dollars in damages.

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The plaintiff further alleged, that Madame Duplantier was proceeding illegally to enforce her order of seizure, by causing the writ to be executed by A. Duplantier, sheriff of the parish of East Baton Rouge, who is her son and forced heir, and is legally incapacitated to act therein on the score of *interest*; that she could only proceed on her mortgage by alleging and showing that she had complied with all the stipulations in said contract, on her part. He further prays that an injunction be awarded and perpetuated, staying said proceedings.

The defendant's counsel took a rule on the opening of the term of the court, in January, 1839, on the plaintiff, to show cause why the injunction should not be dissolved, and the opposition overruled. At the same time the plaintiff filed his peremptory exception to the order of seizure and sale, that it be annulled and set aside, because the contract of sale contains mutual stipulations, which are not and cannot be shown to have been performed in this summary mode of proceeding; that the transfer of the bank stock was a condition precedent on the part of Madame Duplantier, to be first performed; that if it did not contain a condition precedent, it was an obligation on her part to be performed at the same time with those on his part, and she was bound to place him in default by offering to perform, &c.; that her loan from the Union Bank was an incumbrance on the property, and made it liable to seizure, and consequently he was disquieted in his title and possession.

These rules were taken up and tried together; and on the plaintiff objecting, the court decided, that the rule was only assigning the cause for trial on a particular day, and the petition for an injunction was to be considered as an answer to the petition for the order of seizure and sale; that the plaintiff in injunction was called on by the rule to support the allegations in his petition. The opinion of the court was excepted to by the plaintiff.

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The contract of sale, with its various stipulations, was in evidence, and its material parts stated in the opinion of this court. The district judge, on examining the act of sale and hearing the parties, was of opinion there were no legal grounds to support the injunction and opposition, gave judgment, overruling all the objections to the executory proceeding and dissolving the injunction, with ten per cent. interest and twenty per cent. damages. The plaintiff appealed.

Elam and Barton, for the plaintiff in opposition, contended that :

1. The defendant's counsel admits that the obligations of Dawson were prospective ; that the time implied by the contract when he was to offer the slaves to be mortgaged, was fixed for the 1st March, 1837. That this was "part of the consideration of the sale, and implied that the slaves removed by the plaintiff should not be subject or liable to be seized and sold on the falling due of that instalment."

This, the plaintiff could not do without the instalment due and protested on the 1st March 1836, being first paid, and it is not pretended that Dawson was to make that payment. Then the first act to be done was by Madame Duplantier, and Dawson has not been guilty of an active violation of his contract. *Louisiana Code*, 1926. Under these circumstances we were not bound to pay in 1837 or 1838. 6 *Louisiana Reports*, 30. Or to offer a performance.

2. Admit Dawson's undertaking was to satisfy the bank, that the slaves substituted and offered by him were in every respect equal security with those taken off by the plaintiff at the date of the sale (28th June, 1836,) yet Dawson did not obligate himself that the bank should not close the mortgage on the instalment previously due, or to pay that sum.

3. We acquiesce in the doctrine, that as a man binds himself so he is bound, but no farther. Admit that in the act of sale, Dawson acknowledges to have received all the objects sold and described in the act, and the sale of the bank stock, as between the parties, was complete, without the transfer on the books of the bank ; yet Dawson impliedly accepted the sale

under the conviction that the full term of twenty years was allowed him to pay the amount assumed to the bank, and not that the sum was then due with ten per cent. interest.

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The defendant's evidence shows on Dawson's part, it was an engagement entered into through error, "and the information which would have destroyed that error was withheld by the defendant, and amounts to a fraud, and invalidates the contract. *Louisiana Code*, article 1826. It renders the contract voidable, and we can avoid it by our exception. *Louisiana Code*, 1876. This fact being proved by the defendant, we can avail ourselves of it, as well as if this error and fraud had been specially pleaded by us.

4. There was no delivery of the bank stock, and without that delivery or offer to deliver, the defendant was not bound to pay the price and is not in default. *Louisiana Code*, articles 2437, 1903, 1918, 2527, 2450, 2529, 2452, and 2466. *Pothier on Contract of Sale*, No. 476, page 291. *Story's Equity Jurisprudence*, sections 771, 776, 777, and 778. 12 *Louisiana Reports*, 375. It is delivery only in a contract of sale which transfers the property.

5. The condition precedent was on Madame Duplantier, to pay the instalment due on the 1st March, 1836, and redeem the forfeited stock, before Dawson could, from the nature of the case, perform his part of the obligation. It was, further, a condition precedent on the defendant, Duplantier, to offer to deliver the bank stock before she can compel a payment of the price. *Louisiana Code*, article 2529.

6. The cause has not been tried on its merits; if it has, the judgment must be reversed, if it has not, the case must be remanded. Substantial justice cannot be done without it.

7. The sheriff was incompetent to execute the order of seizure, being the son of the party proceeding in it. He was incapacitated on the ground of interest, being the forced heir, at least apparent, to the party having the entire interest in the case.

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A. N. Ogden, Brunot, and T. G. Morgan, for the defendant and appellee, insisted that the plaintiff, by his contract, well knew of and assumed the payment of the defendant's loans, which she had from the Union Bank on the stock. It is so stipulated, and he has failed. If any instalments are due and not paid, it is the fault of the plaintiff; all the stipulations of acts to be done was on his part. He was to substitute other slaves for those reserved in the sale, before the transfer of the stock on the books of the bank could take place. Has he done it, or shown his readiness to perform?

2. The counsel for the plaintiff is mistaken in saying that there was no trial on the merits; it is shown by the record that the cause was fully tried on the merits, and decided on the merits.

The opposition is an answer to the petition for order of seizure and sale. *Roulet vs. Shepherd*, 4 *Louisiana Reports*, 86: *Ibid.*, 292.

3. The party against whom an injunction has been obtained may compel the other to prove in a summary manner the truth of the facts alleged in his opposition, and the proper mode of proceeding is by serving on the adverse party a rule to show cause why his injunction should not be dissolved. 2 *Louisiana Reports*, 321.

4. Where a party fails to show sufficient ground to maintain an injunction, it must be taken as having been wrongfully obtained, &c. *Hudson vs. Plunket*, 4 *Louisiana Reports*, 524. On a motion to dissolve an injunction, the facts are not admitted as true, unless the rule had been taken to show cause for want of sufficient matter being alleged in the petition to authorize the injunction. *Jolly et al. ads. Hebert*, 5 *Louisiana Reports*, 50.

5. No replication being allowed, every averment in defendant's answer must be considered as denied, and the plaintiff is permitted to show by evidence that they are unfounded in law and in fact. 11 *Louisiana Reports*, 521.

6. The act of 1831 applies to the case. 10 *Louisiana Reports*, 519.

7. The law will presume no wrong where it has provided no remedy. There is no law providing for the service of process in civil cases, where the sheriff is related to either party in the suit. At common law, this officer had judicial powers; here his functions are only ministerial. See 1 *Blackstone's Commentaries*, 245, 343, 344; *Code of Practice*, articles 760, 772; 1 *Moreau's Digest*, 284; *Phillips' Evidence*, 36, 39.

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Bullard, J., delivered the opinion of the court.

The defendant having procured an order of seizure and sale against a plantation and slaves belonging to the plaintiff, upon which she had a mortgage, and privilege of vendor. The latter made opposition and obtained an injunction to stay proceedings, and prayed for a rescission of the sale of said property on the following grounds :

1. That the plaintiff had failed and neglected to comply with her contract, and to transfer to him the three hundred shares of stock of the Union Bank, which formed the principal motive for him to enter into the contract, and which stock was secured by mortgage on the said plantation, and a part of the slaves. He avers that he went to the Union Bank for the purpose of receiving such transfer, and to comply on his part with his engagements, but that the vendor failed to appear.

2. That the defendant is proceeding illegally to enforce her order of seizure, by causing the same to be executed by the sheriff of the parish of East Baton Rouge, who is her son and forced heir, and therefore incapacitated to act in the premises.

I. The contract of sale entered into by the parties, after enumerating the land and slaves, which formed the object in part of the contract, proceeds to say : "Moreover, three hundred shares of the capital stock of the Union Bank of Louisiana now owned by the said vendor, secured by mortgage in favor of said bank on the land and some of the slaves above described, which the vendor obligates herself to transfer to the said vendee. It is agreed that the vendor reserves a certain number of slaves, which were, among others, mort-

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gaged to the bank, and the purchaser obligates himself to have the mortgage on the same cancelled and annulled, and further agrees to put himself in the lieu and stead of the vendor, as regards said land, and to execute in favor of the bank, a mortgage on a number of slaves equal to those reserved by the vendor. The purchaser assumed to pay to the bank the balance due by the vendor upon her loan, as a stockholder.

The argument in this court has turned principally upon the construction of this part of the contract, upon the obligations of the parties resulting therefrom, and upon the question, whether there has been such a putting in default in relation to the transfer of the bank stock, according to the regulations of the bank, as to entitle the purchaser to the remedy he seeks. On the part of the plaintiff in injunction, it is argued, that even admitting the act of sale is sufficient evidence of a sale of the stock as between the parties, yet as relates to the bank itself and to third persons, a formal transfer on the books of the institution was promised and is required. That until such transfer shall be executed there is no delivery of the stock, and that the purchaser has a right to withhold the price until the vendor has complied with her part of the contract. On the other side it is contended, that the first step to be taken in order to carry out the intentions of the parties, was to be taken by the purchaser; that until he offered other slaves to be mortgaged to the bank, in order to release those which were reserved by the vendors, it was impossible for her, according to the regulations and by-laws of the bank, to make a transfer on its books, and that she could not be considered as legally in default, until such slaves had been substituted, to the satisfaction of the board of directors; that she had an interest in having such substitution made, because her slaves were still liable to be sold for a debt no longer hers, but which the appellant had engaged to pay to the bank.

It appears to us that, according to the contract between the parties, the bank stock formed a part of the object of the sale, and that the vendor could not afterwards be regarded as a stockholder as between her and the vendee; that if she had

afterwards derived any advantage from the stock, she would have been accountable to him, and that the profits on the stock from the date of their contract belonged to him, saving the rights of third persons. Nothing remained to be done to render the contract binding on the whole world, but a formal transfer on the books of the bank, according to its by-laws. But the by-laws forbid such a transfer until the new mortgage shall have been accepted or found sufficient. If this were a direct action against Madame Duplantier for damages for the non-performance of her promise to transfer the stock, it appears to us clear that such action could not be maintained, without proof of at least a readiness on the part of the purchaser, and an offer to perform what by the contract he was first bound to do, or at least to do simultaneously. She would not be permitted to make a transfer and to substitute another person in her place, until the bank should be satisfied with the new security, and until the vendee had first satisfied the board of directors, he would have no right to complain of a non-compliance, on the part of the appellee, with her part of the contract. If in such direct action the appellant could not recover damages without proof of putting in default, it is not easy to perceive how he can be permitted, by way of exception, to obtain either a rescission of the contract or to withhold the price, not of the bank stock alone, but of the lands and slaves. No time was fixed within which these mutual stipulations were to be performed. Either party might therefore claim an immediate performance, but only upon the terms and in the manner pointed out by law for the enforcement of similar reciprocal engagements. *Louisiana Code, 1907 ; 6 Toullier, No. 609.*

II. The second ground of opposition relates to the competency of the sheriff, who is the son of the defendant in injunction, and appellee. The Code of Practice makes it the duty of the coroner to act whenever the sheriff is interested in a cause. *Article 772.* We must take with great allowance all authorities from the common law, on this subject, for two reasons: First, that the sheriff in England is believed to possess, in some cases, a judicial discretion; and,

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Where the purchaser of a plantation and slaves under mortgage for bank stock, stipulates that the seller may reserve certain slaves and he will put in others, and assumes her obligations to the bank, he cannot claim a rescission of the sale on an exception to her right to proceed against the plantation and slaves for the price; or damages in a direct action, on the ground that she (the seller) has not transferred the bank stock, until he puts her in default by showing a readiness and offer on his part to perform what by the contract he was first bound to do, or at least simultaneously.

When no time is fixed by a contract, within which the mutual stipulations are to be performed either party may claim an immediate performance, according to its terms, and in the mode pointed out by law for enforcing similar reciprocal engagements.

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A sheriff who is the nearest relation and son of one of the parties, is not incompetent to act and execute process in the case. It is a pecuniary interest alone that renders him incompetent.

A judgment by default cannot be taken by the plaintiff in an opposition and injunction to an order of seizure and sale. No answer is required; a rule taken by the adverse party to dissolve the injunction is equivalent to an answer; and such opposition and injunctions are to be tried summarily.

secondly, because his competency to act in particular cases does not depend wholly on his pecuniary interest. He is incompetent when, standing in certain relations towards the parties, on the ground of a supposed bias and partiality. The code, on the contrary, does not declare that officer incompetent on any other ground than interest in the cause, and we cannot suppose the legislature meant any other than a pecuniary interest. When persons standing in similar relations towards each other are declared incompetent to testify for or against each other, their incompetency is not supposed to depend on interest alone. This court has ruled, on the contrary, that the descendant cannot testify in a cause in which his ascendant is a party, even when called to testify against his own interest. Whether similar notions of public policy ought not to incapacitate sheriffs or other ministerial officers, when called upon to act in cases in which their parents or their descendants are interested, is a question for the legislative authority, which alone is competent to remove such an anomaly.

Our attention has been drawn to a bill of exceptions taken to the opinion of the court overruling a motion of the plaintiff and appellant, for a judgment by default, upon showing that the petition for injunction had been duly served, and no answer filed. The court, in our opinion, did not err. The petition for an injunction in this case was in the form of an opposition to an executory proceeding, and no answer is required by the code. A rule had previously been taken by the opposite party to show cause why the injunction should not be dissolved, on the ground that it had been wrongfully obtained. Such rule may be considered as equivalent to an answer. The refusal to allow judgment by default to be entered did not operate any injustice, inasmuch as a trial appears to have taken place, and no evidence offered by either party was rejected. Such oppositions and injunctions are to be tried summarily. *Code of Practice*, 741.

The counsel for the appellant contends that no trial has been had upon the merits. To this it may be answered, that on the trial of the various rules and counter-rules, with

which the record is incumbered, it does not appear that the court refused to admit any evidence offered by either party. Nor did the court err, in our opinion, in deciding that the rule taken to show cause why the injunction should not be dissolved, was to be considered as an assignment of the cause for trial on a particular day; and that the petition for an injunction was to be regarded as an answer in opposition; and that the plaintiff in opposition was called on by the rule to support the grounds of his opposition by evidence. Many of the questions of practice raised in this case have been substantially decided in the case of *Williams vs. Duer*, at the present term.

The judgment of the District Court is, therefore, affirmed, with costs.

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The trial of a rule taken to set aside, and dissolve an opposition and injunction staying executory proceedings, is a trial on the merits, in which the plaintiff therein is called on to support the grounds of his opposition by evidence.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where an agent is employed to buy a quantity of fish, in barrels, with discretionary powers to do the best he can in executing the order, and he procures fish which have passed inspection, but in consequence of the barrels not retaining the brine, the greater part of the fish are spoiled on their arrival, and sold at great loss: Held, that this is not such a degree of negligence on the part of the agent, as will authorize a recovery in damages.

This is an action of damages, to recover from the defendant a certain sum, for loss on a quantity of fish in barrels, which he had purchased and forwarded as the agent of the plaintiffs.

The plaintiffs show that they employed the defendant's firm in Alexandria, to purchase about six hundred barrels of

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prime herrings and shad, in tight barrels, such as would retain the brine; and that the order was so negligently executed, both in the purchase and putting up and shipping said fish, that when they arrived in New-Orleans, the brine having leaked out of the barrels, the fish were sold at a great loss, amounting to one thousand six hundred and thirty-five dollars eighty-three cents, for which they pray judgment.

The defendant pleaded a general denial. The evidence showed that the plaintiffs wrote to defendant the 29th February, 1836, ordering the fish in question, and requiring them to be put up in tight barrels, such as would retain the brine. This letter was in answer to one from the defendant's firm, of the 12th February, soliciting an order for shad and herrings, in which they say: "So far as we can understand, there will be a great improvement in the barrels this year; most, if not all, are made tight, to hold the pickle: this never has been done before."

On receiving the plaintiffs' order, the defendant's firm advised them by letter, on the 17th March, "that they (defendant's firm) would, probably, be obliged to pay for the fish higher prices than they had anticipated; that they were not sure to procure the whole quantity of shad demanded by the order; and that the barrels are much improved, and will be as nearly tight as they can be, of red oak." Upon receiving this, the plaintiffs wrote, that, "with respect to the herrings and shad, you will do the best you can, in the execution of our order. We trust that you will be able to get all the shad."

The fish were purchased and shipped accordingly, after passing inspection; but on their arrival, some or most of the barrels had leaked, and the fish were much spoiled. The plaintiffs called a survey, and had them sold immediately. There was a clear loss on the shipment and charges, to the amount claimed.

The parish judge was of opinion the defendant was liable for the loss; that his mandate and instructions were special, and required him to procure tight barrels, *which would hold*

the brine. There was judgment for the plaintiffs, and the defendant appealed. EASTERN DIST.
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T. Slidell, for the plaintiffs.

1. The point of law on which this question turns, is the duty of an agent to whom a special mandate is given; and the counsel for plaintiffs cannot present a more satisfactory exposition of the subject, than by referring the court to the decision of the learned judge of the Parish Court. In this decision, the court below assumed as an undoubted principle of the law of mandate, that while a general agent is bound under general rules of agency, a special agent, or, rather, an agent acting under special orders or instructions, is bound to conform strictly to the tenor of such order or instructions.

2. Applying this principle to the facts of the case, it is plain that the defendants are responsible to plaintiffs for the loss exhibited in their claim. The plaintiffs ordered the defendants to purchase for them, and ship to the warm climate of New-Orleans, herrings, packed in such barrels as would contain the brine. The defendant did purchase for plaintiffs, but in consequence of his violating the instructions of plaintiffs, which were plain and explicit, and sending herrings packed in barrels incapable of containing the brine, the herrings spoiled, and the plaintiffs were compelled, both in order to save a total loss, and by the orders of the police on the ground of nuisance, to sell the deteriorated goods at auction.

3. It is clear, from the testimony of the witnesses, that, had the fish been packed in barrels capable of retaining brine, they would have resisted the action of climate.

4. If the defendant could not obtain an article *so packed*, as plaintiffs had *specially* directed, and the necessity of which they had ascertained and communicated to defendant, the latter should have declined the execution of the mandate. Having chosen to act in violation of the mandate, he is liable for the consequent loss.

Josephs, for the defendant and appellant.

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1. This is a question of pure agency; and the parish judge has confounded the responsibilities of an agent, with those of a vendor. The facts show that the plaintiffs ordered the defendants to purchase and ship to them, a certain quantity of fish, "put up in barrels, such as will retain the brine, &c., and to be shipped *immediately*." In answer to this letter, the defendants, their agents, reply, "that they will give their best attention to the order for fish;" state some difficulties in reference to the price, &c., and distinctly inform the plaintiffs that the *herring barrels* are much improved, and will be as *nearly tight as they can be of red oak*. The plaintiffs ratify this proceeding in their answer, by saying: "With respect to the *herring and shad*, you will please do the best you can in the execution of our order."

2. An agent can only be called upon to exercise the same diligence that a prudent man would pursue in the management of his own affairs, and Zacharie's testimony shows that a quantity of fish of a similar description, sent by one Johnson, for *his own account*, about the same time, was in as bad, or in a worse condition, than those which form the subject of the present suit. Johnson, himself, tells us that his fish were put up carefully, of the first quality, and under his immediate inspection.

3. Is it not, then, unreasonable to ask the defendants to do more in the execution of plaintiffs' order, than merchants, who purchased for their own account, were able to accomplish? *Story's Agency*, 172--174; *Story on Bailments*, 282.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a judgment, by which damages are recovered from them, on a charge of negligence in the execution of an order of the plaintiffs, for the purchase of a quantity of fish.

The record shows that the order was given on information received from the defendants, that there was great improvement in their market in the putting up of fish in tight barrels, which retained the brine. The order expressly states, that the fish was to be put up in the manner described, which was

in tight barrels. On receiving this order, the defendants informed the plaintiffs, that there was a considerable advance in the price of fish, and that the "barrels are much improved, and will be as nearly tight as they can be, of red oak." EASTERN DIST.
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The plaintiffs, on receiving this letter, directed the defendants to do the best they could in the execution of their order. The fish were purchased and shipped, and on their arrival at New-Orleans, in consequence of the barrels not retaining the brine, a great part of the fish were left dry, and were spoiled, so as to require a forced sale, at a great loss. FORSTALL ET AL.
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It is in evidence that, by the inspection laws of the place where the fish were purchased, fish barrels are required to be sufficiently tight to retain the brine. A witness has testified that he understands the inspectors have, of late, been very careless of their duty in this respect.

The parish judge was of opinion that the defendants received a special, not a general mandate, and were bound strictly to comply with the tenor of it. We do not conceive that the case would have been different, if the order had been for a number of barrels of fish, for this would have meant good and merchantable fish. We find, that by the inspection laws of Alexandria, where the defendants reside, barrels of fish which are not sufficiently tight to retain the brine, will not pass inspection, and are, consequently, not merchantable. It is true, the order was given on the information of the defendants, that there was an improvement in their fish market; but it is equally so, that on the receipt of this order, the defendants informed the plaintiffs that they were not to rely implicitly on that improvement, and that red oak barrels were used, which were made as tight as they could be, of that material. On receiving this information, the defendants were directed to proceed with the purchase, and do as well as they could. The barrels having passed an inspection, must have been presumed to be in good order at that time. Their posterior deterioration may be attributed to subsequent circumstances. We cannot give any weight to the charge of negligence in one of the inspectors, to which one of the witnesses vaguely testifies.

Where an agent is employed to buy a quantity of fish in barrels, with discretionary powers to do the best he can in executing the order, and he procures fish which have passed inspection, but in consequence of the barrels not retaining the brine the greater part of the fish are spoiled on their arrival, and sold at great loss: Held, that this is not such a degree of negligence on the part of the agent as will authorize a recovery in damages.

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The case does not, in our opinion, establish such a degree of negligence on the part of the defendants, as to authorize a recovery.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled and reversed, and that judgment be entered for the defendants, with costs in both courts.

CROSBY vs. HEARTT.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where a draft or order is not in its form negotiable, but if it is accepted *payable to the order* of the payee, it thereby becomes negotiable. In negotiable instruments the plea of error or mistake is not available against an endorsee.

This is an action on a draft or order accepted by the defendant, as follows :

"Mr. H. G. HEARTT,"

"Sir : Please to pay to Wm. H. Ker, the above sum of three hundred and eighty-three dollars and five cents, and charge the same to me, on account of the building I am now constructing for you.

CHARLES FERDON."

"I will pay to the order of Wm. H. Ker, the above sum of three hundred and eighty-three dollars and five cents, out of the second payment I have to pay Charles Ferdon, on my building on Constance-street, as per contract before W. Y. Lewis. New-Orleans, 23d August, 1839.

H. G. HEARTT."

The defendant excepted, alleging the suit was premature ; that the second payment was not yet due, on which the payment of the order depended as a precedent condition. This exception was overruled.

In answer to the merits, the defendant denied that the terms and conditions of his acceptance were fulfilled, or the work was done on which the second payment depended, and further, that the plank and lumber charged in W. H. Ker's bill, for which the order was drawn, was not in fact furnished, as stated, by him, but by another person.

The contract showed that the second payment or instalment was to be paid as the building advanced and when the work arrived at a certain stage.

The evidence showed that the building was progressing when payment of this order was demanded; but the precise state of forwardness cannot be ascertained from the statement of the witnesses. Ker assigned this order or draft to the plaintiff.

There was judgment in his favor, and the defendant appealed.

G. B. Duncan, for the plaintiff.

Cohen, contra.

Martin, J., delivered the opinion of the court.

The defendant having employed one Charles Ferdon to build him a house, the latter gave an order on him in favor of Wm. H. Ker, for the amount of certain materials furnished, which was accepted, payable to *Ker's order*, out of the second instalment to become due for the building of the house. Ker endorsed this draft to the plaintiff, the recovery of which is the object of the present suit.

The defendant pleaded that the suit was premature, that the second instalment was not yet due; and that he accepted the order through mistake. There was judgment against him, and he appealed.

The Commercial Court, in our opinion, did not err in overruling the plea to the prematurity of the suit. The evidence shows that the second instalment, on the falling due of which the draft was to be paid, was payable by the advance of the work.

Where a draft or order is not in its form negotiable, but if it is accepted, payable to the order of the payee, it thereby becomes negotiable.

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In negotiable instruments the plea of error or mistake is not available against an endorsee.

It is true the draft was not, in its form, negotiable, but the defendant by accepting it payable to the order of Ker, gave it negotiability. In negotiable instruments the plea of error or mistake, like that of absence or the failure of consideration, is not available against an endorsee.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Brokers are not licensed in this state, and as such are unknown to our law. A party to a contract who denies that he acted as principal must show that he made this known at the time of the contract, or allege and prove his agency at the trial.

Brokers in this state buy and sell paper on their own account, and that of others; and must be responsible as all other individuals.

And where a broker failed to disclose his principal at the time of sale of a promissory note, or show who he was at the trial, he was considered as having sold the note on his own account, and held responsible for its genuineness.

There is no usury in the sale of a note, although more than the highest rate of conventional interest was deducted, if the vendor does not endorse it, or is not a party to it.

It is of the essence of the contract of loan, that he who receives money is bound to return it, and to which alone usury attaches.

This is an action first instituted against the maker and endorser of a promissory note. They both expressly denied that they signed and endorsed said note, and charged that their names were forged or counterfeited, and prayed to be dismissed.

The plaintiffs, in an amended petition, alleged that they purchased the note sued on, from Charles Papet, for a valuable consideration, and prayed that he be made a party, and cited to defend; this suit against the charge of forgery; and that in case the defendants succeeded in establishing their defence, the plaintiffs have judgment against Papet for the amount of said note and protest, and for damages.

Papet pleaded a general denial. He denied specially having sold the note, because he never was the owner of it; averred that he was a duly licensed broker, and paid taxes as such; and that if he delivered the note in question to the plaintiff, it was as an exchange broker; and he was not apprised that it, or any other note he may have negotiated, was not genuine. He pleads usury, and the want of amicable demand.

Upon these pleadings and issues, the cause was tried before the court and a jury.

The defendants proved that their signatures were not genuine, to the satisfaction of the jury.

It was also shown that the plaintiffs purchased the note in question of Papet. The latter admitted to a witness that he sold it to the plaintiffs. The note was for four thousand dollars, and the plaintiffs gave a check for three thousand eight hundred and fifty-three dollars and thirty-two cents, deducting from the note one hundred and forty-six dollars and sixty-eight cents, for eighty-eight days interest.

After hearing the evidence and receiving a charge from the judge, the jury returned a verdict "for the defendants."

There were several bills of exception taken to the charge of the judge, and other of the proceedings, which it is unnecessary to notice. The facts of the case are nearly all shown by the pleadings.

From judgment confirming the verdict, the plaintiffs appealed.

Curry, for the plaintiffs, submitted the following points in writing:

1. The evidence does not warrant a verdict in favor of the maker and endorser, on the ground that their names are forged or counterfeited. The witnesses speak doubtfully and

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hesitatingly of the signatures. The principal witness, himself a broker, says he has taken notes with similar signatures, as genuine.

2. The instructions of the district judge to the jury are erroneous and improper, on the grounds set forth in the exceptions taken.

3. If the endorsers are not liable, Papet is, as the vendor of the note sued on. He cannot escape on the plea that he was a broker, for he disclosed no principal. He either acted as agent or principal, and if he disclosed no principal, he must be liable individually.

4. The vendor guarantees the genuineness of the note, though not the solvency of the makers. The vendor is always bound in warranty, unless expressly excepted. The maxim of the civil law is *caveat vendor*.

Denis, Preston and Pichot, appeared for the defendants, in the court below.

Eustis and Benjamin, for the plaintiffs.

Martin, J., delivered the opinion of the court.

This is an action against A. Foucher as maker, and F. Saulet as endorser, of a promissory note.

The defendants severed in their answers, but both expressly averred that they did not sign and endorse their names to the note sued on, and that their signatures are counterfeited or forged.

On the filing of these answers, the plaintiffs presented a supplemental petition, alleging that they purchased and held said note as the vendees of one Charles Papet, for a valuable consideration; and as the defendants, by their answers, deny their signatures, and allege them to be forgeries, they pray that Papet be made a party defendant, and in case the defendants are not liable, that they have judgment against him for the amount of said note.

Papet pleaded a general denial, and averred that if he sold and delivered the note sued on to the plaintiffs, it was as an exchange broker, and that he was a duly licensed broker,

and acted in that capacity alone. He also avers, that he never knew of any note he may have passed or negotiated, as broker, was ever false or forged. Lastly, he pleads the want of amicable demand, and usury.

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There was a verdict and judgment for the defendants, and the plaintiffs appealed.

The jury, in our opinion, correctly found for the maker and endorser of the note, as the evidence satisfied the jury that their signatures were forged, and we are unable to say that they erred. The case is, therefore, to be considered with regard to Papet alone.

Our attention is drawn to a bill of exceptions taken to the charge of the court. The jury were instructed, "that if they considered it proved that this defendant sold the note, he must show for whom he acted as broker; which may be shown when called on, although not done at the time of the sale. That the defendant being proved to be a licensed broker, is presumed, in making the sale of the note, to have acted as such, although he named no principal, for whom he acted at the time. But, when called on in a case like the present, it is incumbent on him to disclose his principal; and if he does not, he will be presumed, in law, to be the owner."

"If the jury, however, believe that the defendant passed the note as a mere agent, or broker, although he was unable to prove his agency as to any particular individual, and was guilty of no fraud, the jury ought to find in his favor."

If the plaintiffs and appellants have a right to complain of any part of this charge, it must be the last part of it. We have not inquired into its correctness, because it has not appeared to us to have any bearing on the case.

Brokers are not licensed in this state, and as such are unknown to our law.

We are ignorant of any law of this state, authorizing, or relating to licensed brokers. They are not known to us. Parties to a contract, who deny that they acted as principals, must show that they made this known at the time of the contract, or allege and prove it at the trial. The term *agent* is a relative one; and it is of its essence that it have its correlative, to wit: a principal. Brokers in this state buy and sell paper on their own account, and on that of others.

A party to a contract who denies that he acted as principal, must show that he made this known at the time of the contract, or allege and prove his agency at the trial.

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Brokers in this state buy and sell paper on their own account and that of others; and must be responsible as all other individuals.

And where a broker failed to disclose his principal at the time of sale of a promissory note, or show who he was at the trial, he was considered as having sold the note on his own account, and held responsible for its genuineness.

There is no usury in the sale of a note, although more than the highest rate of conventional interest was deducted, if the vendor does not endorse it.

It is of the essence of the contract of loan, that he who receives money is bound to return it, and to which alone, usury attaches.

When they sell on their own account, they must certainly be responsible, as all other individuals. This responsibility would vanish, if they could escape from it by alleging, without proving it, that they acted for another. If the responsibility does not rest on the agent, it must lie on the principal; and he must be made known, otherwise, the responsibility would be removed from the agent, without being fixed on any one else. Papet, not having disclosed his principal in this case, at the time of the sale, nor shown who he was at the trial, must be considered as having sold the note on his own account, and be held responsible for its genuineness. We do not mean, however, to say, that at the time of the sale, the broker must name the owner of the paper, but it is his duty to make known to the purchaser that he does not sell on his own account.

There was no usury in this transaction, although more than the highest rate of conventional interest was deducted in the sale of the note; for the vendor, not having endorsed it, would not have been bound to repay what he received, if it had been genuine. It is of the essence of the contract of loan, that he who receives the money, should incur the obligation to return it. The contract which intervened between the parties in this case, was one of sale; so that the plea of usury is unavailable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as it relates to the defendants, Foucher and Saulet, be affirmed, with costs. It is further ordered, adjudged and decreed, that the judgment, as far as it relates to the defendant, Papet, be annulled and reversed; and that the plaintiffs recover from the heir of Papet, made a party to this appeal, the sum of four thousand dollars, with three dollars costs of protest; no amicable demand being necessary in a call in warranty; and it is ordered that the defendant pay costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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Parole evidence is admissible to show that the description of a lot in an act of sale, was made through error and accident, and that the lot actually sold was a different one from that described in the deed.

This is a petitory action for a lot of ground which the plaintiff alleges he purchased from the defendant, by public act, the 17th day of May, 1830, but that she continues in possession and refuses to deliver it up. He prays that he be decreed to be the true owner of said lot, and that possession be delivered to him, together with thirty dollars per month for the time she has withheld it from him.

The defendant pleaded a general denial. She admits she sold the plaintiff a lot, but denies it is the one he claims; and that the sale of it was made through error, by the plaintiff and her agent giving an erroneous description of it to the notary.

It was admitted that the defendant is in possession of the lot claimed and described in the act of sale under which he claims.

Parole evidence was offered and received to show that the act of sale was made in error, and that instead of conveying a lot with thirty feet front on Frenchmen-street, it was a lot fronting on Morales-street, and that the plaintiff purchased it for one hundred and fifty dollars, took immediate possession, and built a house on it.

The defendant continued to reside in her house on Frenchmen-street, which was built at the time of the sale. The plaintiff finding out that his deed of sale called for this lot, instead of the other where he resides, now attempts to avail himself of the error or mistake, and recover it from the defendant. A bill of exceptions was taken by the plaintiff's counsel, to the introduction of witnesses to prove that the description of the lot in the act of sale was made in error, and that the lot really sold fronted on Morales-street.

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There was judgment for the defendant, and correcting the description of the lot, so as to make it read, "thirty feet front on *Morales-street*, with the depth of sixty feet." The plaintiff appealed.

Soulé, for the plaintiff, insisted that no parole evidence could be received against an authentic act, which made full proof of what it contains.

Ducros, contra.

Morphy, J., delivered the opinion of the court.

The defendant purchased from the estate of *Pierre Denis Delaronde*, a lot of ground in the suburb *Marigny*, measuring sixty feet front on *Frenchmen-street* and one hundred and twenty feet in depth and front on *Morales-street*. In 1830 she sold to plaintiff for one hundred and fifty dollars, a small portion of said lot, which is described in the deed of sale as measuring thirty feet front on *Frenchmen-street* by sixty in depth. Under this conveyance, the plaintiff took possession of and occupied thirty feet front to *Morales-street*, by sixty in depth, leaving defendant in possession of the remainder of the lot, to wit: sixty feet on *Frenchmen-street* by ninety feet on *Morales-street*; of this portion, defendant in 1834 sold to one *La Barthe* one-half, forming the corner of *Frenchmen* and *Morales* streets, thus reserving to herself thirty feet on *Frenchmen-street* by ninety in depth, on which she had built a dwelling-house before the time of the sale to plaintiff, and which she had always since occupied and inhabited.

The plaintiff now seeks to recover a lot of ground such as is called for by his deed of sale. Defendant resists this claim on the ground that there was evidently a mistake and misdescription in that instrument; that the piece of ground intended to be sold by her and purchased by the plaintiff was that of which he had taken possession since 1830; which he had improved and where he had been living ever since.

The only question arising in this case grows out of a bill of exceptions taken by plaintiff's counsel to the opinion of the

judge *a quo*, by which he admitted *parole* evidence to prove error and mistake on the part of the notary in describing the portion of the lot intended to be sold. We think the judge decided correctly. This is not an attempt to prove, *by parole*, a sale of immovable property, nor to contradict a valid existing instrument, but to show that by accident or negligence the instrument in question has not been made the actual depository of the intention and meaning of the contracting parties. How can a mistake of this kind be proved but by *parole*? How can it be proved more strongly than by the acts and declarations of the party himself to whom it is opposed? These acts and declarations, which are extrinsic circumstances, are generally susceptible of proof in no other way than by witnesses. It is on these grounds that testimony is let in to prove fraud in every kind of transaction. Cases of error are sometimes kindred to those of fraud, and should be governed by the same rules. Is it not an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the parties to a contract? In cases of this kind, to be sure, there should be the strongest proof possible, but to reject testimony altogether would be in many instances to sanction the grossest frauds. 2 *Louisiana Reports*, 3, *Berard's Heirs vs. Berard*; 4 *idem*, 350, *Broussard vs. Sudrique*; 4 *Starkie on Evidence*, 10 and 18; 1 *Vesey's Reports*, 456, *Baker vs. Paine*; 1 *Sergeant and Rawle*, 464, *Christ vs. Diffenback*; 8 *Wheaton*, 211, *Haut vs. Rousmanier*.

In the present case it is proved, by a number of respectable witnesses, that shortly after the sale to plaintiff, in 1830, he took possession of the piece of ground fronting on Morales-street, which was intended to be sold to him, and built upon it a small house in which he has been living ever since. That some time after the sale, the plaintiff became aware of the error that had been committed, and expressed himself willing at first to have it corrected, but that he afterwards changed his mind and declared to several persons his intention of availing himself of the circumstance, because the lot described in his deed of sale was of greater value than that of

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Parole evidence is admissible to show that the description of a lot in an act of sale was made through error and accident, and that the lot actually sold was a different one from that described in the deed.

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which he had taken possession ; that at the time of the sale to plaintiff, the defendant had already erected a house, worth about one thousand dollars, on the lot which he now seeks to take away from her, as having been purchased by him for one hundred and fifty dollars. Upon the whole, the evidence establishes, beyond any doubt, the error alleged by defendant, and the shameful bad faith of plaintiff in attempting to take advantage of it.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

UNION BANK VS. SLIDELL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT, JUDGE BUCHANAN
PRESIDING.

Where payment of the *second*, instead of the first note, is made in error, the mistake may be proved by witnesses, and the error corrected, without affecting the liability of any of the parties to the note.

The payment being made in error, did not extinguish the obligation evidenced by the note, nor the mortgage which was its accessory.

This is an action against the maker of a promissory note, secured by mortgage.

The defendant admitted his signature, but averred that the note was extinguished by payment made by H. G. Schmidt, who had assumed the payment thereof; that the mortgage given by Schmidt on assuming the payment, was cancelled and extinguished, or, if not extinguished, the right was so impaired by *stamping the note as paid*, as to prevent any recourse thereon by the executory proceeding. He avers he is discharged from all liability, and prays to be dismissed.

The evidence showed that the note in question was given, with another of the same tenor and amount, for the purchase of property; but the first was payable the 27th February, 1837, and the other, 27th February, 1838. H. G. Schmidt afterwards purchased the same property, and *assumed* the payment of these notes, with mortgage to secure payment.

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The two notes were discounted in bank, and by an error of the clerk, both were placed on the books as due on the same day, and given to the clerk who receives payment of notes discounted, or deposited in bank for collection.

Schmidt came, on the 27th February, 1837, to pay the note of Slidell, which became due on that day, and the clerk gave him the note of February, 1838; it was *stamped as paid*, on its face, and on the back was endorsed "received payment, of H. G. Schmidt," and signed by the note clerk. On the close of the day, the other note of Slidell being due, and remaining unpaid, and he having a larger amount to his credit in bank, he was debited with the amount of the note, and was credited with the amount of the other one paid by Schmidt. Some days afterwards, Slidell was notified that his account was overdrawn, which, on examination, was found to proceed from charging him with the first note which was due. He stated that Schmidt was bound to pay those notes, and had the entry in the bank book corrected crediting his account, and debiting the account of the person who had got the note discounted, with its amount. Schmidt being informed of the mistake, applied to the note clerk who gave him the discounted note, and received back the note not then due, but which had been *stamped and receipted as paid*, through error, and which is the subject of the present suit. Before this note became due, Schmidt was insolvent, and made a *cessio bonorum*.

There was a bill of exceptions taken by the defendant's counsel, to the opinion of the judge, admitting parole evidence to show that the note had been paid through error, and also to show generally the circumstances under which it had been stamped and receipted as paid.

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Judgment was given for the amount of the note against the defendant; but the plaintiff was required to give security to warrant the defendant against any loss or delay, in the prosecution of his claim against Schmidt, occasioned by the erroneous stamping and receipting said note. The defendant appealed.

Derbigny, for the plaintiff.

T. Slidell, contra.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment on his promissory note.

It appears he made two notes of sixteen hundred dollars each, payable on the same day and month of the years 1837 and 1838, which were lodged in the bank for collection. Schmidt, who had assumed the payment of these notes, called at the maturity of the first, and paid it. Through mistake the clerk handed him the note payable in 1838, after having stamped it as paid. At the closing of the bank on that day, the other note being still there, was taken up as a check, the defendant having sufficient funds in bank to meet it. Having drawn a check for the balance which he supposed to be in bank at his credit, and being ignorant that this balance had been reduced by taking up this note as a check, information was sent to him that he had overdrawn. The defendant came to the bank, and discovering the cause of the reduction of his balance, he insisted on the correction of the mistake, and had the rightful balance reinstated. In the mean time, Schmidt having discovered that he had received the second, instead of the first note, claimed and received the first note on returning the second, at the maturity of which, Schmidt having failed, the defendant refused to pay it, on the ground that Schmidt having the faculty of paying, and having actually paid this note by anticipation, the bank had no right, without the defendant's consent, to annul this payment and to revive his liability. He further contended, that the payment of the note being secured by mortgage in the notarial act by which Schmidt had assumed

Where payment of the second, instead of the first note, is made in error, the mistake may be proved by witnesses, and the error corrected, without affecting the liability of any of the parties to the note.

its payment, the stamp put on it by the bank, deprived him of the faculty of obtaining an order of seizure and sale in the usual manner; and his remedy against the estate surrendered by Schmidt might be affected or impaired by the circumstance of the note not having been placed on the bilan.

It appears to us the District Court did not err, as it provided that the plaintiff, before taking out execution, should furnish to the defendant a bond with good security in a sum exceeding the amount of the note, to indemnify him against any loss in prosecuting his claim against Schmidt's estate, occasioned by the erroneous stamping of the note sued on.

The failure of Schmidt absolutely deprived the defendant from any resort to an order of seizure and sale; therefore, the stamp erroneously put on the note did not place him *in duriore casu*. It is evident that the payment made by Schmidt of the second, instead of the first note, was made in error, and therefore did not extinguish the obligation of which this note is the evidence, nor the mortgage, which is its accessory. This error was properly proved by witnesses.

The payment being made in error, did not extinguish the obligation evidenced by the note, nor the mortgage which was its accessory.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TERRILL vs. BONNABEL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it appears from the record, that complete justice has not been done between the parties, and the trial being by jury, this court will not render final judgment, but remand the case for a new trial.

This is an action of damages against the defendant, for building on the wall of the plaintiff, and breaking and injuring it so as to render his house untenable; and for

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stopping up his windows, and obstructing his chimneys, and causing them to smoke; also in constructing his own windows, and leaving openings in the common wall between them, from which filth and dirty water is constantly thrown upon petitioner's roof, and into his yard. He prays judgment for five thousand dollars damage, and that the defendant be required to close up his windows and openings in the wall.

The defendant averred, that he had acquired, for a valuable consideration, the use of the plaintiff's wall, and has taken all the necessary precaution in building, to prevent injury and damage; and that if any actual damage has accrued, he is by no means answerable therefor. He further averred, that his windows and openings were in his own wall, and placed as he had a right to do, and positively denied that the plaintiff received any injury, or that any filth or dirty water was ever thrown from them. He pleads a suit brought against him by the plaintiff in one of the city courts, as settling all these matters, and as *res judicata*. Upon these pleadings and issues, the cause was first tried before the court.

The following comprises a brief synopsis of the facts and evidence, from the statement of the district judge:

"Terrill, the plaintiff, is owner of a house and lot in Tchoupitoulas-street, and Bonnabel is the adjoining proprietor. It was found that the wall of Terrill's house stood, at the front, three inches on Bonnabel's ground; and in the rear, thirteen inches. They entered into an agreement, to avoid difficulties, that the wall, and the land on which it stood, should be common property.

Beside the front, or main building, Terrill has extensive back buildings, adapted to a tavern, in which was a dining, and sleeping rooms.

The wall of the back building has a foundation of two and a half or three bricks, and the wall was one and a half brick thick, and two low stories in height. It has been built ten years. In the summer of 1832 and the winter of 1833, Bonnabel erected a four story front and back buildings.

Finding the foundation and wall of Terrill's back building insufficient to support the intended structure, Bonnabel put another foundation and a new wall on his own land, adjoining the foundation and wall of Terrill's back building. After he had raised the new wall to the height of Terrill's old wall, he spread his wall over the old and new wall. The wall of Bonnabel is thirty feet higher than that of Terrill. Before Bonnabel had raised his new house, and before any thing was done to the back buildings, Trudeau, his undertaker, died. The widow employed a person of the name of Scribner, to finish the job. Scribner gave the brick wall to one Johnson. Both of these persons are deceased.

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The wall of Terrill's back building has settled very much : it is said, as much as six inches. The joists are drawn out of the wall so as to have very little hold on the wall, and the floor is in danger of falling.

The house is rendered uninhabitable. Two builders, witnesses for plaintiff, are of opinion that the building must be taken down and reconstructed, which would occasion a cost of two thousand dollars. Two witnesses, for defendant, are of opinion that the joist holes in the wall may be cut, and the joists and floor raised so as to make the building nearly as good as ever, for three hundred and fifty dollars.

Bonnabel has also inserted windows in the wall raised above the common wall of the front building, and plaintiff complains that defendant is not entitled to have these windows, and demands that they be shut up. He also complains that nuisances are thrown out of these windows on his roof, whereby he is prevented from using his rain water."

There was no proof that the present damages were the subject matter of the suit in the city court, and relied on as *res judicata*.

This cause was once tried in part, but the judge presiding was of opinion it was of great importance in settling principles, set it down for further evidence and argument. Since that time, Terrill sold the property to Banks ; which fact was pleaded in a peremptory exception, by the defendant.

The plaintiff then discontinued so much of his case as

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relates to the nuisance and windows, and prosecutes it for the injury done to the wall of the back buildings, and consequently to the buildings themselves.

The district judge was of opinion the defendant violated the law. When he found that Terrill's wall would not support his more lofty building, he should have taken it down, and put up a new and sufficient one. Judgment was given, allowing the plaintiff fifteen hundred dollars for the injury he had sustained. A rule was taken for a new trial, and to obtain further evidence, and the case was reinstated, and put on the jury docket.

It was finally submitted to a jury, who returned a verdict for the defendant; and from judgment thereon the plaintiff appealed.

Preston and Roselius, for the plaintiff.

D. and J. Seghers, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which rejects his claim for damages and reparation, on account of the defendant's building on his wall so as to crush and break it, and stopping up his chimneys, and opening windows, from which water and filth are thrown on to his house and into his yard. He alleges, that he has amicably demanded from the defendant to close up his windows and openings in his wall, and to run up the flues of petitioner's chimneys, and to indemnify him for breaking his wall.

The defendant denies that he caused the injury complained of, and expressly avers that the plaintiff forbid his chimneys and wall to be run up. He denies having constructed windows or left openings in the common wall, and that they are in his own property, and constructed in the manner he had a right to do. He also avers, that if any damages have been caused to the plaintiff, they have been settled in a suit between them, which he pleads as *res judicata*.

The plaintiff, at the trial, discontinued so much of his demand as relates to the nuisance from the windows and

stopping his chimneys, and prosecutes suit for the injury done to his walls, and especially the back buildings.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

From a careful examination of the evidence in the record, it does not appear to us that complete justice has been done, and, as the case was tried by a jury, we do not feel authorised to render a final judgment, but think that justice requires it should be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; the verdict set aside; and it is further ordered and decreed, that this case be remanded for further proceedings according to law, the defendant and appellee paying the costs of the appeal.

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Where it appears from the record, that complete justice has not been done between the parties, and the trial being by jury, this court will not render final judgment, but remand the case for a new trial.

UNION BANK vs. GRIMSHAW.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.

The law is well settled, that notice of the non-payment or dishonor of a bill given to the drawer by the acceptor, or any of the parties to it, is sufficient, and enures to the benefit of all the other parties.

Letters written on the day the bills become due, by the acceptor, and addressed to the drawer, that they must go back protested, is sufficient notice to him.

So, if a note or bill is presented in the forenoon of the day it becomes due, and payment is refused, notice given in the afternoon is good.

Part payment, or a promise to pay a bill or note, furnish grounds to infer presentment, and notice of the dishonor or non-payment.

So, where the defendant, as drawer of bills, after being advised by letter from the acceptor of their dishonor, acknowledged the debt, and

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promised to pay the holder of the bills by instalments, on short time it must be viewed either as an admission that the notices were good or a waiver of them.

This is an action on two bills of exchange drawn by the defendant, the 18th February, 1837, on N. Berthoud, of New-York, payable sixty days after sight, to the order of the cashier of the Union Bank. They were accepted, and protested for non-payment at maturity; one on the 3d, and the other on the 6th of May following.

The defendant admitted his signature to the bills, but denied all the other allegations in the petition.

Interrogatories were propounded, inquiring of him if he had not received notice of the dishonor of the bills, by mail, and from the notary who protested them, or in some other way, and at what time, and how he received such notice. Also, did he not receive notice from the acceptor that the bills were not paid, and to annex the notices to his answer.

The answer negatived all the interrogatories except the last, in which the defendant states, "that he received no other advice of the non-payment of said bills from the acceptor, than is contained in his letters to me of the 3d and 6th of May last, and which are annexed."

In the first letter, dated New-York, 3d May, 1837, Berthoud states: "annexed, you have a duplicate of *what I wrote you this morning*, per the common mail. Matters are most gloomy in Wall-street, to-day," &c., "and I fear the banks are not much better off. I made another attempt to discount paper to pay your draft of twenty-five thousand dollars, due to-day, but could not succeed; it will, therefore, be protested."

On the same day he writes another letter, in which he says: "In making arrangements for the bills on me which must inevitably go back, you must get as long time as possible, to get time to collect from the parties here. Under existing circumstances, I hope the banks will be as lenient with you, as they may be with the most favored parties," &c. &c.

On the 6th of May, Mr. Berthoud states: "Your draft for twenty thousand dollars, *due this day, must go back.* It now looks as if not another note I hold, payable this month, would be paid." It was in proof that the bills came back protested, in due course of mail, with notices of protest enclosed to the plaintiffs; that they were handed over by the officers of the bank to the defendant's clerk. This clerk, however, states they were not given to him until about the 25th June, afterwards. On the 20th May, the defendant addressed a letter to the bank, stating the situation of his affairs, and that he had come to the conclusion of temporarily suspending payment of his obligations, and asking indulgence, with the privilege of renewing the bills on time. He also says: "he received notice this day of the protest and non-payment of one of his drafts, passed through this bank on Mr. Berthoud, of New-York, which will probably be followed by others."

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On the 5th February, 1838, the defendant again addressed the bank on the subject of renewing these bills, and says: "I would gladly give further security to the bank, were it in my power, and had I any portion of the assets belonging to these bills, in my own possession," &c. "From the representations I receive from that gentleman, (Berthoud), I have the utmost confidence of the proposed renewals being at least duly met.

The negotiations failed of success, and on the 22d February, 1838, this suit was instituted.

There was judgment for the plaintiffs, and the defendant appealed.

Eustis, for the plaintiffs, contended, that notice of the dishonor of a bill may come from any person who is a party to it; that if the drawer or endorser receive notice from any person who is a party to the bill, he is directly liable to the subsequent endorser, from whom he had no notice of the dishonor; and in an action by the endorsee against the drawer, it is expressly laid down, that it is sufficient if the drawer had notice of the dishonor, *even from the acceptor.* 3 *Kent's Com.* 108; *Chitty on Bills*, 538. 2 *Campbell*, 373, 1 *Starkie*, 34; 5 *Coven*, 309.

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We now come to the facts of the case before us:

2. In considering the letters of Grimshaw simply as matters of evidence, we find none of the circumstances attending them which would render them inadmissible, or without consequence. At the several times they were written, he was not even menaced with a suit; they were not written to buy his peace, nor under any ignorance of the facts; for, he says in his answers to interrogatories, that he received no other notices than those from Berthoud. In this, he is mistaken; but this disclosure shows that his attention must have been directed to these letters: *his* letters show the same fact.

In this view of the subject, we must look for the rules of evidence in our own jurisprudence, which, however, coincides with that of England, and the other states, in this point.

Mr. Starkie, in his treatise on evidence, p. 32, and seq., treats of the subject of concessions or admissions, and states the law at length. He makes the very obvious distinction between the *admissions* or *conduct*, upon which a party has induced others to act, or by which he has acquired some advantage to himself and others, of a less conclusive character. He repeats the well known doctrine, that an admission of a fact may be presumed, not only from declarations, but from silence and the acquiescence of the party, as when the existence of a debt or right is asserted in his presence, and he has not contradicted it. Page 38, *id.*, Starkie states that a *conditional admission*, where a condition has not been performed, is not admissible in evidence.

In this case the objection cannot be made, for the letters are in evidence without objection. From the examples given by Starkie, it will be seen that the rule he has stated would not include the letters of Grimshaw, or reach their effect. It may be correct as a general rule, but the exceptions to it must be very numerous, e. g., where the condition itself necessarily presupposes the existence of the obligation. In such a case, there is every reason for the *admission* of the evidence.

Besides, is not a *conditional admission* or *concession*, as a matter of evidence, an *absurdity in terms*; a promise may be conditional, or a contract may be conditional, but how can a matter of evidence be conditional? It proves a fact, or not. It cannot be said that it *shall not prove* a fact, because it is conditional; for the condition may prove the fact. The only objection to admissions, except to those made in duress, or for buying peace, is to their effect. The undersigned cannot refrain from giving the opinion of Pothier on this subject; the highest authority on matters of obligation in the palace, in this court, or in Westminster Hall:

"The confessions which we here speak of, are those which the debtor makes in conversation, or by letter, or which incidentally occur in some act not passed expressly for that purpose. Dumoulin distinguishes those confessions which my debtor makes to myself, from those made to a third person, not in my presence. When it is to myself that the debtor has confessed the debt, his confession is a complete proof of the debt; but if it were made in a *vague manner*, and without expressing the cause it forms, according to this author, no more than an imperfect proof which requires to be confirmed by the suppletory oath, which the judge ought to administer to me." *Pothier on Obligations*, No. 801.

3. It is clear, though Pothier does not recognize the conditional confession, yet in his opinion, admissions vague, and without expressing the cause, are admissible; and though they form but an imperfect proof, still, with other evidence, may be taken to establish the existence of the obligation.

In 13 *East*, 213, *Brett*, assignee of *Harrison vs. Levet*, a question arose as to the admissibility of the admission of a party to a note after bankruptcy, and the Court of King's Bench held, that the want of notice to a *drawer* may be supplied by evidence of his acknowledgment to the holder, after bankruptcy, when asked if the bill would be paid, that it would not.

It is observed, that in all the various cases which have been collated with so much care by compilers of the law of

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bills of exchange, it does not appear that there is any objection to the admissibility of confessions or conversations of parties, except in case of the operation of some motive on the part, which renders the admission not probable. But, is there any *condition* in the letters of Grimshaw? There is a term of payment, but not a condition. They are two things very distinct; the former necessarily presupposing a debt, and the latter not.

A term differs from a condition, inasmuch as a condition suspends *the engagement formed by the agreement*; whereas a term does not suspend the engagement, but merely postpones the execution of it." *Pothier on Obligations*, 230.

The existence of the same distinction in England, is recognized by Mr. Evans, in his notes to Pothier.

4. The propositions of Grimshaw in his letters were not conditional, so as to diminish their force as admissions; and were they not acted upon by the plaintiffs? Did he not get nine months *absolute delay*? a greater or more advantageous indulgence than he asked, in consequence of his coming forward and acknowledging his indebtedness without qualification, and appealing to the liberality of the plaintiffs, under the most solemn assurances of payment.

Bailey, p. 498, and notes, states the rule on this subject to be, that a part payment, without any objection being made for want of notice, furnish grounds from which a jury may infer presentment, notice and protest: that an agreement with a prior endorser to pay the bill by *instalments*, is *evidence* in favor of a subsequent endorsee, that the party agreeing to pay the instalments, had received due notice of the dishonor.

Chief Justice Abbot, in deciding the case which settled the doctrine, said: "Had the defendant been discharged by want of notice, he would have insisted on his discharge; he would not have agreed to pay the bill."

Wood vs. Brown, *Bailey*, 497; 1 *Starkie*, 217, where the defendant said in a letter that he was an accommodation drawer, and that the bill would be paid before the following term, Lord Ellenborough held that this made proof of the

notice of the dishonor unnecessary. If there has been a subsequent application for indulgence, the only question is, whether it has been made under a mistake of fact; and this must be shown. This is a matter for the jury to consider. *Bailey*, 498, note 29.

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5. It remains to show that the letters of the defendant amount to a waiver of notice, even supposing none to have been given. There is a difference between the waiver of notice by the drawer and by the endorser: by the former it may be implied; by the latter there must, it seems, be an express promise, or what is tantamount to it. "It has been considered, that admitting that a drawer may by circumstances *impliedly* waive his right of defence founded on the laches of the holder, yet an endorser can only do so by an *express* waiver; there being a material distinction, in this respect, between the situation of a drawer and endorser." *Chitty*, 540. A recital in an agreement between the drawer and the first endorsee, recognizing the liability of the drawer to pay, may be given in evidence against the *drawer*, at the suit of a *subsequent* endorsee. *Idem.*, 538. A case exists, in which an *endorser*, after a promise to pay the debt by instalments, was permitted to take advantage of his want of notice. *Idem.*, 539. But in this case the judge considered that his offer was made under ignorance of the circumstances, and was not binding. *Goodale vs. Dolley*, 1 *Term Reports*, 712. In this case it was not contended or considered that the promise was not express, or that it was conditional; but that the endorser had been discharged by the laches of the holder, and made his offer in ignorance of the facts.

Phillips, in his *Treatise on Evidence*, vol. II., 31, edition of 1839, says: "In general, if the *drawer of a bill deal with it* after it is dishonored, with a knowledge of the circumstances, it is sufficient to charge him." It would not be sufficient to charge the endorser. 2 *Starkie on Evidence*, 273; *Notes*, to the same effect.

Griffin vs. Goff is the first case cited by defendant's counsel on the subject of waiver. This was against an *endorser*, and contains nothing which we have any interest in contesting.

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The answer that *he knew of no defence*, amounts to nothing, but to establish the ignorance of the matter by the endorser. *Hiller vs. Hickley*, a suit against an endorser. The promise here was too vague. Van Ness, J., says: "The defendant only said to a third person, when talking generally of all the bills, (that on Baltimore as well as on Charleston,) *that he would take up the bills or see them paid*. Whether he used one phrase or the other is left in doubt, and if the first phrase was used, it was altogether uncertain whether he meant to be understood that he would resist or pay the bills:" *Hopley vs. Dufresne*, a strong case in our favor. For as to Grimshaw's being fully apprized of all the facts of his case, when he wrote the letters of May 20th, 1838, and February 8th, 1839, there can be no doubt. This case is conclusive. The plaintiff had been non-suited, and "it did not *expressly appear that when the defendant applied for indulgence, he was apprised of the objection to the presentation*." The court stopped the argument, and set aside the non-suit, on the ground that it should have been left to the jury to say whether, under the circumstances of the case, the defendant knew, at the time of the application for indulgence, that there had been no due presentation. This case was also against an endorser. *Cummings vs. French*, 2 Campbell, 106, *at nisi prius*, a promise made under an arrest, when asked what he, the defendant, *had to propose for a settlement*; held to be neither an acknowledgment nor a waiver, so as to dispense with proof of notice. No importance appears to have been attached to the promise having been made to pay at a future time. *Agan vs. M'Manus*, suit against an endorser, 1814.

The offer was to take up this note and give his own, "payable in one year." This was held not to be binding on the defendant. This was a conditional offer for a compromise and nothing else. "Give me the note on which I am endorser," says the defendant, "which is now due. I will take my recourse on the parties to it, and I will give you my note, payable in twelve months, for it:" a proposition for the purchase of the note, by which, if the drawer was good, he would have had the use of the amount for one year, without

interest. The condition in this case was independent of, and did not presuppose the existence of the original debt. The distinction between this case and the present is too obvious to require illustration. One was an offer to compromise, which did not necessarily imply the existence of an original obligation; the other was a *prayer for indulgence*, and an offer of security for an acknowledged debt. But there is a matter which puts the application of this case out of the question. Every state, that is, all the old commercial states, have their particular usages about promissory notes. This action was on a promissory note, and the question was whether this proposition was binding as an *assumpsit* on the defendant. The ground of *waiver* was inapplicable to the case. Chief Justice Thompson says, in giving the opinion of the court: "The doctrine applicable to waiver of notice of the dishonor of bills of exchange, does not apply to promissory notes." *Crain vs. Colwell*, 1811. Suit on a promissory note against an *endorser*, contains nothing which we have any interest in contesting. Note B. to page 300, 8 *Johnson*, contains nothing which has not been already examined.

Trimble vs. Thorn, 1819, suit on a promissory note against an *endorser*. The question here was, whether there was an *assumpsit* on the part of the defendant. We have seen, in the case of *Agan vs. M'Manus*, that in New-York the doctrine of waiver of the want of notice did not apply to promissory notes. If this case applied to the present, it would not in any manner affect the decision; for it is idle to contend that *Grimshaw* was ignorant of any fact in relation to the case.

Anthon's Digest, p. 68, *Miller vs. Hickley*, and notes. *Anthon's Digest of nisi prius cases*, is a work of no authority, and, from the time of its publication, can contain nothing which has not been discussed in other works on the same subject. *Miller vs. Hickley*, has been examined. The notes contain nothing which is not found elsewhere.

12 *Wheaton's Reports*, 183, *Thornton vs. Wynn*, 1827. This is a leading case, and was one on which, after mature deliberation, the case of *Williams vs. Robinson*, in 13th *Louisiana Reports*, was decided. This case was brought up from the

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District of Columbia. The knowledge of the *laches* formed an indispensable part of the plaintiff's case. The court held that, *from the admission* of the defendant, a regular demand could not be inferred, *but that due notice was not given he could not fail to know*. This might be inferred from his admissions. In our case, there is no question about the demand, and there can be, according to the rules laid down in this, none as to the notice.

This case contains one of the best expositions of the law concerning waiver of notice. The action was against an endorser.

2. *Campbell's Nisi Prius Reports*, (no reference to page.) There is nothing in this volume which has not been repeated in the different treatises on bills of exchange. It is advisable to bear in mind the year in which these cases were reported, and those which have since been confirmed, acted upon or overruled. *Ticknor vs. Roberts*, 11 *Louisiana Reports*, p. 17; *Harris vs. Allnut, & Co.*, 12 *idem.*, p. 465; *Bank of United States vs. Ellis*, 13 *idem.*, 369.

In the first case, the promise was made by an endorser in error, in ignorance that no demand had been made on the drawer. In the second, it is assumed that the *endorsees* were exonerated by the *laches* of the holder. A knowledge of these rights was required to be necessary, before they could be *supposed* to renew their obligation; at any rate it must be shown that they were not ignorant of their rights, or they will not be bound.

This opinion, delivered by Judge Carleton, is based on the authority of 3 *Kent's Commentaries*, p. 113; *Chitty on Bills*, 308; and, it is to be presumed, does not mean to go beyond them. We may as well give the authority from *Kent*: "If due notice of non-acceptance or non-payment, or a demand on the maker be not made, yet a subsequent promise to pay, by the party entitled to notice, will amount to a waiver of a want of demand or notice, provided the promise was made clearly and unequivocally, and with a full knowledge of the fact of a want of due diligence on the part of the holder. The weight of authority is, that this knowledge may be

inferred as a fact, from the promise under the attending circumstances, without requiring clear and affirmative proof of the knowledge." This is believed to be the most complete and sound rule of the law of waiver of notice as it now stands and was adopted, after a diligent review of all the cases decided by the Supreme Court, in the case of *Williams vs. Robinson*, 13 *Louisiana Reports*, 420.

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Here end the cases cited by the defendant's counsel ; and if there is any one of them which affects in any manner the right of the plaintiffs to recover, except so far as it may fortify it, the inquiry on the part of the undersigned has been, indeed, fruitless.

He will conclude this reply, which has been continued to this length only by his respect for every thing which emanates from his learned brother, by briefly giving his view of this last branch of the case under consideration, the law of waiver. It is believed that there is no better statement of it than the very case cited, of *Thornton vs. Wynn*, and the rule of Chancellor Kent adopted by this court.

6. There are numerous cases which have, as it were, formed the jurisprudence on this subject. The case of *Wood vs. Brown*, 1 *Starkie*, 217, decided by Lord Ellenborough, is very strong : it has already been noticed. The drawer said that he was an accommodation drawer, and the bill would be paid *before the next term*, meaning of the court. The chief justice said : "the defendant does not rely on the want of notice, but undertakes that the bill will be paid before the next term, either by himself or the acceptor. I think the evidence sufficient." In this case there was no proof of notice of dishonor, &c., and the plaintiff only gave in evidence the letter of the defendant. There was a verdict for the plaintiff.

Of the effect of an agreement to pay by instalments, see *Bailey on Bills*, 498, *Note 28*, case of *Gunson vs. Metz* ; 1 *Barnwell vs. Creswall*, 193. Here was a promise to pay by instalments, not to the holder, but to a prior endorsee : this dispensed with any proof of dishonor of the bill, and was held to be an acknowledgment of the debt ; no one thought

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Hopley vs. Dufresne is a strong case also in our favor; it has been cited by the counsel for the defendant. This is the case in which an application for indulgence was discussed.

It is well to remark that in the last edition of Bailey on Bills, all that is within brackets is not from the author, but added by the American annotators. From page 296 to 302 is from the annotators, and merely gives American cases.

See *Chitty on Bills*, last edition, 534, 535 and 536, also 503; *Margeson vs. Goble*, 2 *Chitty*, 364; *Hopkins vs. Liswell*, 12 *Massachusetts Reports*, 53.

7. The court has the law before them. It has grown up in modern times on this subject, in furtherance of the principle on which the commercial law is founded, that a man's word is his bond. Lord Mansfield is reported to have said, that "in commercial cases among merchants, the want of consideration is not an objection." 3 *Burrows*, 1669.

"Where a man is under a moral obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration; and as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration." *Per Lord Mansfield, Cowper*, 290; 2 *Blackstone's Commentaries*, 445.

This is the foundation of the law of waiver; the object of the notice is to enable the party to obtain security, and save himself from injury. If this object be effected; if he has not sustained loss from any laches of the holder, the highest moral obligation exists on the party to return the money received by him; and any acknowledgment of this obligation will authorize a court to enforce it against him. Such is the *Law Merchant*, which is, in this age, not a mere collection of arbitrary and technical rules, but the law of right and reason.

L. Peirce, for the defendant and appellant, urged that there was no notice of protest received from the notary, and

none from the bank until the 20th of June, nearly two months after the dishonor of the bills; but the notices of protest of the bills now sued on, were received by the cashier of the bank in due course of mail. The drawer of the bills not receiving notice from the notary who protested, nor the holders or their agent, must be discharged.

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2. The letters of Berthoud to the defendant, are relied on as notice. Is it the fact? The first letter is written on the morning of the 3d of May, to go by the common mail, the day the first bill was payable, in which he says: "These bills must inevitably go back protested." This cannot operate as notice for the one due on the 6th of May, as it could not be construed as notice of that which had not happened; nor is it notice of the one due on the third, for he had all day to pay it in, and until the notices were sent off next morning. The drawer could not act upon the notice; he must wait until the event takes place, before he could go against the acceptor; and he could not show that the bill was protested, if he wished to attach or hold to bail.

It appears the acceptor did attempt (as appears by his second letter of the same day) to raise funds by discounting paper, but could not succeed; so that he had a chance, and as long as the day and night lasted, he might still save himself; for he had assets, but the difficulty was to realize them. A fear or anticipation of protest from the acceptor, cannot amount to a notice. In all countries, a premature protest or notice is invalid. *Chitty*, 507; 1 *Pardessus*, 452.

3. In the second letter of the 3d of May, the writer does not say that payment has yet been demanded and refused; he evidently speaks, as in the first letter, *prospectively*. Is this notice of demand and refusal to pay the bill of the 3d of May? Certainly not. The court cannot surely maintain the plaintiffs' case upon these anticipations of the acceptor. *Chitty on Bills*, 527.

4. But the question here is, who is to give notice? If the acceptor had given notice, *after* he had been put in default, and *within* the time, and not *before*, it would not have sufficed; it must come from the holder. 1 *Term Reports*, 167; 7 *Vesey*,

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A valid protest for non-payment can only be made by a lawful holder, entitled to demand and receive payment. *Chitty*, 526. However, according to the more recent decisions, it is not absolutely necessary that notice should come from the person who holds the bill, when it has been dishonored; and it suffices if it be given after the bill was dishonored by any person *who is a party to the bill*, who would, on the same being returned to him, and after paying it, be entitled to require reimbursement. *Chitty*, 527; 2 *Campbell*, 177. There is a case in 4 *Campbell*, 87, which seems to be against the elementary principle above laid down, where the acceptor wrote to the drawer that he had not been able to pay the bill, (not that it would not be paid,) and that it was then in the hands of the plaintiff. *Bailey on Bills*, 5th edition, explains this case, that it might have been, "that the acceptor wrote for the plaintiff, and as his agent." See 14 *Massachusetts Reports*, 116.

5. The defendant is not liable for the bill of the 6th of May. All he says is, "your draft due to-day must go back." Is this a notice of presentment and refusal to pay? The bill had not been yet presented, and there is no evidence of the notice after protest or presentment. Shall an anticipation of inability to pay amount to notice that the event has occurred?

6. The plaintiffs next seek to make the defendant liable by his propositions and admissions to the bank, and which were made without any proof that he knew of the irregularities of protest and notice, and which were never accepted. There was no waiver of regular protest and due notice in these propositions. See the cases of *Griffin vs. Goff*, 12 *Johnson*, 428, and *Miller vs. Hinkley*, 5 *Johnson*, 379, on this branch of the case; also, 15 *East*, 27; 2 *Campbell*, 106; 11 *Johnson*, 180.

7. The promise to pay must be positive, not qualified or conditional, and rejected by the holder, or it is no waiver of notice, or irregularity of protest. 8 *Johnson*, 299, and note B, 300; see also 16 *Johnson*, 154. The promise to pay must

be unconditional. 12 *Wheaton*, 183; 2 *Washington C. C. Reports*, 514; 2 *Campbell, N. P. Reports*.
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8. The defendant never made an absolute promise; he only proposed terms, which were not accepted; consequently he has not waived his right of proof of due notice of the dishonor of the bill. If he was ignorant of his rights, and that there was no demand of the acceptor and legal notice of protest, he is not bound by any admissions or propositions he may have subsequently made. They were made in error, and cannot deprive him of his legal rights. The following cases are relied on, in support of this position: 11 *Louisiana Reports*, 17; 12 *idem.*, 465; 13 *idem.*, 369.

9. To conclude, notice by any party to a bill, of the non-payment, is not sufficient, when that party has no interest in such notice, and can have no right of action on the bill. 3 *Wendell*, 179; see also *Chitty*, 229; *Bailey*, 161; 2 *Campbell*, 273.

10. Is the offer to pay a debt in notes to be considered as cash; and the defendant's endorsed notes for the balance, an absolute promise to pay? The offer to pay was conditional. The proposition was to take certain bills receivable of the defendant, as cash. This the bank refused. The balance was to be paid at certain terms, by defendant's own notes, endorsed. This was refused. See 8 and 11 *Johnson*, 299 and 180, already cited, on this subject.

Morphy, J., delivered the opinion of the court.

The defendant is sued on two bills of exchange, drawn in favor of the plaintiff, on N. Berthoud, of New-York, accepted by the latter, but protested for want of payment, at maturity. The defence set up is, that due notice has not been given to the drawer. Plaintiffs obtained a judgment, from which this appeal has been taken.

To establish the fact of notice, to the defendant, interrogatories on facts and articles were put to him. He stated that he had received no notice of the dishonor of his drafts, except that contained in two letters received from the acceptor, Berthoud,

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EASTERN DIST. which he annexed to his answers. These letters are dated May, 1840. on the 3d and 6th of May, 1837, at which periods the drafts respectively fall due. Berthoud writes in substance, that he could not pay the bills, and that they must inevitably go back protested.

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This notice is objected to on two grounds, to wit:

1. That it should have come from the holder.

2. That it was premature.

In our examination of this case, we have been materially assisted by the able and elaborate briefs handed to us by the counsel on both sides.

I. In support of his first objection, the counsel for defendant has relied on several cases to be found in the English books; we have examined them, and find that the point before us was directly made only in two of the cases cited; and it was held in them that notice should come from the holder. *1 Term Reports, 167, Tindal vs. Brown; ex parte Barclay, 7 Vesey, 597.* But this doctrine was overruled by Lord Kenyon, in *Shaw vs. Craft, (Chitty on Bills, 528.)* It was proved that a message was left at the house of the drawer by the acceptor, stating that the bill had been dishonored. Lord Kenyon said: "that it made no difference *who apprised the drawer, since the object of the notice was that the drawer might have his recourse against the acceptor.* We have been referred also to the case of *Stanton vs. Blossom*, to be found in *14th Massachusetts Reports, 116.* It determines only that a drawer who has not accepted is not a party to a bill, and that notice from him is in no degree better than notice from any other stranger; and that notice must come from the holder or some one authorized by him or from one liable as endorser. But in this case the drawer had become a party to the bills by his acceptance, and was primarily bound for their payment. The case of *Rosher vs. Kiesen*, in *4th Campbell*, has much analogy to the present. It was proved that on the day the bill became due, the acceptor wrote to the defendant that he had not been able to pay the bill, and that it was in the hands of the plaintiff. Lord Ellenborough held this to be sufficient notice. It is difficult to perceive why it should not be so considered;

notice to the drawer by any party implies that the holder looks to him and secures to him all the benefit he could derive from a direct notice from the holder himself; any agent having possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill.

From a careful review of all the authorities cited by both counsel, we take the law on this subject to be now well settled, that notice from any person who is a party to the bill, is sufficient and enures to the benefit of all the other parties. 3 *Kent's Commentaries*, 107; *Chitty on Bills*, 527; *Bailey*, 249; 2 *Campbell's Reports*, 373, *Jameson vs. Swinton*; 1 *Starkie*, 34, *Wilson vs. Swabey*; 3 *Wendell*, 173, *Chamoine vs. Fowler*; 7 *Bingham*, 530, *Salarte vs. Palmer*. If regard be had to the reason of the rule requiring notice, it is not easy to perceive the defendant's right to complain of that given to him in this case. From the correspondence between Berthoud and the defendant, and that between the latter and plaintiffs, it would appear that Berthoud was entrusted with collecting notes and business paper belonging to the defendants in New-York, and applying them to the payment of these drafts; having entirely failed in his collections in consequence of the extraordinary pressure then prevailing in that place, Berthoud advises defendant to make arrangements with the plaintiffs, and get from them time enough to enable him to make his collections; and we find defendant treating accordingly with the plaintiffs, and craving their indulgence as their acknowledged debtor. Under such circumstances, defendant had no step to take against the acceptor, to secure himself; but even if he had, the notice from Berthoud enabled him to act in the same manner as if it had come from the holders themselves.

2. But it is further objected, that the notice, admitting it to have been properly given by the acceptor, was premature, because the latter had the whole of the days on which he gave notice, to pay the bills. It does not appear at what time of the day the letters communicating notice were put in the post-office; the letter of the 3d of May, forwarded by the

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The law is well settled that notice of the non-payment or dishonor of a bill given to the drawer by the acceptor, or any of the parties to it, is sufficient, and enures to the benefit of all the other parties.

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Letters written on the day the bills become due, by the acceptor, and addressed to the drawer, that they must go back protested, is sufficient notice to him.

So, if a note or bill is presented in the forenoon of the day it becomes due, and payment is refused, notice given in the afternoon is good.

express mail, would seem to have been written in the afternoon. It begins with these words: "Annexed you have duplicate of what I wrote you *this morning*, per the common mail." After speaking of the gloomy state of affairs on that day in Wall-street, it proceeds thus: "I made another attempt to discount paper to pay your draft of twenty-five thousand dollars, due to-day; but I could not succeed; it will, therefore, be protested." In the duplicate enclosed in this letter, Berthoud advises the defendant to make arrangements with plaintiffs for all the bills which, he says, must inevitably go back. The letter of the 6th says: "Your draft of two-thirds of the account of J. R. & Co., for twenty thousand dollars, due this day, *must go back*." This very announcement of Berthoud that defendant's drafts must go back protested, implies very thoroughly that it is in consequence of his default to pay them. There is no question as to the legality of the demand and protest, but the point is made as to the regularity of the notice. Can the defendant complain that it was given the same day the bills were protested? It has been held, that if a note is presented in the forenoon of the day it becomes due, and payment is refused, notice given in the afternoon is good. 3 *Campbell*, 193, *Burridge vs. Manners*. It was urged, as in this case, that the notice was too soon, because the maker had the whole day to pay the note; but Lord Ellenborough thought it a sufficient notice; for as soon as the maker refused payment, the note was dishonored. The time of the day at which Berthoud's letters were written, was a matter of fact to be inferred by the judge *a quo*, from all the attending circumstances. Of these, the strongest was, perhaps, the defendant's own correspondence with the bank. The letters of the 3d and 6th of May were before him; he might have ascertained, from Berthoud, the exact moment when they were written. And we find him, on the 20th May, 1837, and afterwards, on the 5th and 8th of February, 1838, acknowledging, in the most unqualified manner, his indebtedness to the bank, and craving their indulgence. From these facts, it might well be inferred that defendant had satisfied himself that these letters were written at a

proper time to fix responsibility upon him. But, should the correctness of the conclusion arrived at by the judge below on this head be doubted, we think that defendant's prayer for indulgence, and his repeated promises of payment, amount to a waiver of notice, in case none had been given. In defendant's first letter to the plaintiffs, after fully acknowledging his obligation to pay his bills, he proposes to renew them at four, six, eight and ten months sight, with interest, under the most solemn assurances of payment. Nine months after, he writes two other letters in the same sense, asking the plaintiffs' indulgence on paying part, and offering additional security.

It is objected that these propositions of defendant were rejected; that his promises to pay were conditional; and that it is not proved that he had, when he made them, a full knowledge of the *laches* of the holders by which he was discharged.

The defendant's propositions, it is true, were not formally accepted, but in consequence of his unqualified acknowledgment of the debt and positive assurances of payment, the plaintiffs forebore to bring suit until the 22d of February, 1838; thus granting him a delay of nine months, a greater or more advantageous indulgence than he had asked.

It does not appear to us that there is any condition in defendant's letters; there is a *term of payment*, but not a *condition*. They are two things very distinct; the former necessarily presupposing a debt, and the latter not. "A *term*," says *Pothier, No. 230, on Obligations*, "differs from a condition, inasmuch as a condition suspends the engagement formed by the agreement; whereas a *term* does not suspend the engagement, but merely postpones the execution of it." *Bailey on Bills*, 498, and *Notes*, states the law on this subject to be, that a part payment without any objection being made for want of notice, or a promise to pay, furnish grounds from which a jury may infer presentment, notice and payment; that an agreement with a prior endorser to pay the bill by *instalments* is evidence in favor of a subsequent endorsee, that the party agreeing to pay these instalments, had received due notice

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Part payment, or a promise to pay a bill or note, furnish grounds to infer presentment and notice of the dishonor or non-payment.

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So, where the defendant, as drawer of bills, after being advised by letter from the acceptor, of their dishonor, acknowledged the debt, and promised to pay the holder of the bills by instalments on short time, it must be viewed either as an admission that the notices were good, or a waiver of them.

of the dishonor. Chief Justice Abbott, in deciding the case which settled the doctrine, said "had the defendant been discharged by want of notice, he would have insisted on his discharge; he would not have agreed to pay the bill."

As to the knowledge in defendant of the want of due diligence on the part of the plaintiffs, we think with the judge below that when he made his communications to the bank, he was fully apprised of the irregularity or defect, if any there was, in the notices he had received. According to his declaration under oath to the interrogatories propounded by plaintiffs, he had no other notice than those contained in the letters of Berthoud; and it is in evidence that those letters were before him when he made his first proposition to the plaintiffs. Defendant's acknowledgment of the debt, and his promise to pay it, must then be viewed either as an admission that the notices were good, or as a waiver of them, which his sense of the high moral obligation he was under to return the forty-five thousand dollars, received from plaintiffs, prompted him to make.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a person buys an *interest* or share in a speculation of lands and town lots, which soon after and suddenly decrease and fall greatly in value, from causes independent of any act or fault of the seller, he cannot resist payment of his notes or obligations, on the ground of failure of consideration.

A hope or expectation of gain or profit in some enterprise or speculation, may form the object of a contract of sale.

This is an opposition of John Slidell to the tableau of distribution filed by the testamentary executors of I. L. M'Coy, deceased, demanding to be placed on said tableau as a privileged and mortgage creditor for the amount of two promissory notes of six thousand six hundred and sixty-seven dollars each, and five hundred dollars for professional services rendered. The notes were signed by M'Coy, payable to the order of E. Salzman, and by him endorsed. The evidence shows that they were given for part of C. F. Zimpel's interest in a speculation or purchase of several small tracts of land on the coast above New-Orleans, on which the towns of Dublin and Germantown were laid out. They were placed in the hands of Slidell, in pledge and as security against his endorsements for Zimpel, by his agent.

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The circumstances under which M'Coy gave these notes, and the grounds on which payment is resisted are so fully set forth in the opinion of this court, that it is needless to recapitulate them.

The judge of probates allowed the claim and ordered the tableau to be amended, by placing the plaintiff and opponent thereon as an ordinary creditor, for the amount of his claim. The heirs of M'Coy appealed.

Eustis, for the plaintiff in opposition, insisted, that there was no failure of consideration, even as between the original parties, but if there was, Slidell was not privy to the contract. He was the *bona fide* holder of the notes, negotiable in their form, and binding on the maker.

Strawbridge, for the appellants, contended that Slidell was not the legal pledgee of the notes, and could not recover. He attacked the case of *King vs. Gayoso, 8 Martin, N. S., 370*, as not law, and urged the court to revise and overturn that case.

2. He insisted that Zimpel had the entire control of the speculation and so mismanaged its affairs as to exonerate M'Coy, who had confided in him.

Bullard, J., delivered the opinion of the court.

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This is an appeal from a judgment of the Court of Probates, sustaining the opposition of J. Slidell to the tableau filed by the executors. The opponent claimed to be placed on the tableau as a creditor of the deceased, in virtue of two promissory notes subscribed by the testator in favor of E. Salzman, and endorsed by the latter, and which had been pledged to the opponent by Zimpel, under the following circumstances:

It appears that Slidell, Grimshaw, Claiborne, Cammack, Baldwin, Nicolet, Field and Zimpel, became interested in the purchase of several tracts of land, contiguous to each other, fronting on the Mississippi and extending to lake Pontchartrain. Their object was to lay out upon the front two towns, to be called Germantown and Dublin, and to sell out the lots upon speculation. By an act subscribed by the parties on the 8th of March, 1837, it appears that the whole cost (five hundred thousand dollars,) of which Zimpel, in whose name the title was, exclusively, owned two hundred thousand dollars, and the balance belonged to the other partners in different proportions. The fronts upon the Mississippi and upon the shore of the lake were to be laid out into squares and lots, and sold at public auction within sixty days, and the rest of the tracts within two years, the whole under the superintendence of Zimpel, who was to sign all the acts of sale to the purchasers of lots. The shares of the different partners were payable to Zimpel. That of the present appellee, amounting to fifty thousand dollars, was payable as follows: ten thousand dollars in cash, twenty-eight thousand one hundred and sixty-six dollars, by taking up Zimpel's notes for that amount, endorsed by him, which had been given to C. Fortier, in part payment of the land; and the balance, eleven thousand eight hundred and thirty-four dollars, in his, Slidell's notes, satisfactorily endorsed, payable in one, two and three years.

By a subsequent contract, to which the appellee was not a party, Zimpel ceded all his interest, except sixty thousand dollars, to different persons, and among others to I. L. M'Coy, the testator, who became interested to the amount of twenty-five thousand dollars. In part payment of his interest, the

notes now in question were given. The parties to this second contract agreed to comply with the conditions and stipulations contained in the first agreement between the original parties. Zimple acknowledges to have received from M'Coy, in payment of his interest thus taken, five thousand dollars cash, and the note now in dispute endorsed by Salzman. These notes, together with others received from the other parties, were delivered to Zimpel.

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It appears that afterwards, Slidell and Zimpel entered into an agreement by which the former sold out to the latter all his interest, and withdrew from the speculation. It was agreed that the notes of Slidell for eleven thousand eight hundred and thirty-four dollars should be given up and cancelled. Zimpel gave his own notes, amounting to six thousand six hundred dollars, payable in one, two, three and four years, and in order to indemnify Slidell against his endorsements of Zimpel's notes for twenty-eight thousand one hundred and sixty-six dollars, he, by his agent, deposited with L. T. Caire, notary, as collateral security, "*pour par lui en compter quand et à qui de droit,*" among other notes those of M'Coy, endorsed by Salzman, given originally by M'Coy on account of his share in the concern. The notes of M'Coy were delivered afterwards by the notary in whose hands they were deposited to the present appellee, upon his producing those of Zimpel, endorsed by himself. The notary testifies that they were delivered to Slidell in compliance with the contract of pledge.

M'Coy's notes thus given in consideration of his participating in the speculation as a partner of Zimpel, who was the real owner of two-fifths and the ostensible owner of the whole property, were delivered directly to him. They do not appear to have been deposited with the notary, subject to certain conditions, as was the case with the notes given by the original partners. M'Coy became an associate, subject to all the conditions and stipulations of the first contract. Zimpel was not only interested to the amount of two-fifths, but he was the agent of the partners and subject to their control.

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In the court below, the right of the appellee to be collocated on the tableau as a creditor of the testator was contested on the grounds, 1st. That he was not the owner of the notes by a legal and sufficient title; and, 2d. That the consideration for which they were given had failed, the said Zimpel having violated the contract. In this court, the grounds of defence are substantially the same. It is contended, that although the notes were pledged to the appellee before they were due, yet he took them subject to all the equity existing originally between Zimpel and M'Coy, and that the consideration has totally failed. Although there was no original privity of contract between Slidell and M'Coy, yet it appears to be conceded that the former knew the consideration for which the notes had been given. Let that be conceded for the sake of the argument, and then let us inquire into the question of consideration.

It is not pretended that there was not originally a valid and lawful consideration for these notes. M'Coy purchased in fact one-eighth of Zimpel's interest in the land, and he became interested to the amount of one-eighth in the profit to be made by the sale of it in the shape of town lots. But in case of loss, can it be supposed that the parties intended it should all fall upon Zimpel? that he alone was to pay for the land, and his associates to take a share of the profits, if the speculation succeeded, but to risk nothing? These contracts, on the contrary, established a limited partnership between all the parties. The land constituting the stock had been acquired in the name of Zimpel, but belonged beneficially to the different partners, according to their proportional interest. Zimpel was the agent of all concerned, and was subject to their control. It was the design of the parties to sell a part within two months, and to close the whole sale within two years; but there is nothing in the contract to prevent the parties proceeding afterwards, if any change of circumstances put it out of their power to complete the sale within sixty days. Although, on the 10th of May, the sale was suspended by order of Zimpel, after a few lots had been sold, nothing prevented the parties interested from adapting

their course to the changed condition of affairs, and although the public appetite for extravagant speculation was cloyed, the parties might yet have come to a partition among themselves, or have converted into farms, or gardens, or grazing grounds, the lands which they at first designed for streets public squares and town lots. But will it be contended, that the parties, according to a just construction of their contract, were at liberty to stop short on the first indication of a change of times, and without taking any steps to compel their agent and partner to proceed to save something from the wreck, to throw every thing upon him, compel him to pay the whole, and they retire without loss? Could any of the partners, under those circumstances, recover back from Zimpel the advance which had been made in money? It is not pretended that Zimpel was guilty of any fraud in the transaction. It is true he stopped the sale after a few lots had been sold, really or nominally because the tide had turned; but no attempt has been made to show that his conduct was injudicious or disapproved of at the time by the parties interested. On the contrary, they appear to have acquiesced in it, and to have regarded the speculation as no longer practicable.

But it has been said in argument, that Zimpel had the entire control of the speculation, in relation to the towns of Dublin and Germantown. An inspection of the original contract will convince us that this is a mistake. Article 6th provides that, "the undersigned or their legal representatives, will meet at such time and place as they will agree on hereafter, and in all deliberations relative to the present operation, or connected with it, the undersigned will be entitled to one vote for each fifty thousand dollars."

It appears to us, that M'Coy purchased on the faith of Zimpel, a certain interest in the tracts of land, and the hope of realizing a great profit. Such an uncertain hope may form, according to the code, the object of a contract of sale. It happens sometimes, says article 2426, that an uncertain hope is sold, as the fisher sells a haul of his net before he throws it; and although he should catch nothing, the sale

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Where a person buys an interest or share in a speculation of lands and town lots, which soon after and suddenly decrease and fall greatly in value, from causes independent of any act or fault of the seller, he cannot resist payment of his notes or obligations, on the ground of failure of consideration.

A hope or expectation of gain or profit in some enterprise or speculation may form the object of a contract of sale.

EASTERN DIST. still exists, because it was the hope that was sold, together
May, 1840. with the right to have what might be caught."

ST. JOHN ET AL. The right of a pledgee of a promissory note, generally, to
vs. recover, has not been questioned. The authority of the case
SANDERSON; of *King vs. Gayoso*, 8 *Martin, N. S.*, 370, has been strongly
COCHRAN INTER- contested; but the view which we have taken of this case
VENOR. renders it unnecessary to enter into these considerations.

The judgment of the Court of Probates, is, therefore, affirmed, with costs.

ST. JOHN ET AL. vs. SANDERSON; COCHRAN INTERVENOR.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where a stock of goods are shown to have been purchased on the credit of a third party, under false and fraudulent pretences of the defendant, and the former takes them into his possession, with a view to sell them and take up his drafts and acceptances given for the price, he will hold them against an attaching creditor of the defendant.

A party suffering from the fraud of another is entitled to relief; and where fraud would vitiate a contract of sale of goods, as between the original parties, a third party on whose credit they were purchased, and who assumed payment, should not be made the victim of the fraudulent acts of the purchaser.

The same relief will be extended to an innocent party, who has become responsible for the contracts of another, by accepting his drafts and giving him his credit, as to a surety, who even before payment may demand to be indemnified by the principal debtor, when the latter is in a state of insolvency.

This is an action against the maker of three promissory notes, payable to the order of the plaintiffs. The defendant resides in Texas, and an attachment was obtained against

the cargo of the schooner Oregon, about to sail for that country, consisting of four hundred and ninety-nine barrels of lime, eighteen boxes marked for Houston, (Texas,) and two trunks, as the property of Sanderson. Several creditors intervened, and among them A. G. Cochran, who alleges, that the whole of the goods and property attached were purchased for cash advanced by him, or on his faith and credit for drafts accepted by him; that he was induced to make said purchases by fraudulent and deceitful representations of the defendant. That he has since ascertained from his correspondent in Texas, that defendant was bankrupt and in bad credit, and procured from him a transfer of all the goods and property on board said schooner, and a surrender of all the dray receipts, bills of lading, and all the evidence of title to them, of every kind; that he engaged an agent to take charge of the cargo and go out with it to Texas, and there sell it, to procure the means of taking up the acceptances and cash payments advanced on the original purchases. That after these arrangements were made, viz: on the 9th January, 1840, the whole property was attached, and has been taken into the custody of the sheriff at the suit of the plaintiff. He prays that the property attached be delivered up to him, having superior claims to those of the plaintiff.

Upon this intervention and opposition to the plaintiffs' demand, the whole case turned and was tried.

The evidence seemed to be conclusive in establishing the fraudulent purchase of the goods attached, and that the intervenor was induced, through the fraudulent representations of the defendant, to make advances, and became bound for the whole of the purchases; and that he had taken the necessary steps to secure himself, by the transfer of the goods, and this too, before the attachment was levied.

The plaintiffs had judgment against the defendant, for the amount of their debt; but the goods and property attached were ordered to be delivered up to the intervenor. The plaintiffs appealed.

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I. W. Smith, for the plaintiffs, contended:

The defendant having, by the aid of the intervenor, purchased the goods in question, endeavored, by a subsequent arrangement, to get possession of them, and secure the amount for which he had obligated himself. This subsequent arrangement was not a sale, for no price was stipulated. It was not a *pledge*, for there was no notarial act. The right of property remained in the defendant, and the attachment was properly levied on the goods.

2. The intervenor charges, that the defendant obtained the goods under fraudulent pretences. The evidence shows that the goods were obtained by the aid of the intervenor's name. This was furnished. If there was bad faith on the part of the defendant towards the intervenor, that could not affect the validity of the sale to the defendant, as to attaching creditors. If there were any fraud, the objection could only be taken by the vendors of the goods. It comes with bad grace from one whose name has enabled the defendant to purchase the goods, and thus hold himself out to the world as the owner of property.

3. When the intervenor has paid the bills accepted by him for the goods, it will be in time to examine his claim of privilege as co-obligor of defendant.

E. A. Bradford, for the intervenor and appellee.

The testimony establishes that H. Sanderson obtained the goods attached in this suit, on "fraudulent pretences." His contract for the goods, therefore, was void *ab initio*. It was not translativ of property. He acquired under it, only the naked possession of the goods, which gave no right to his creditors to attach them in his hands. 2 *Louisiana Reports*, 514; 3 *idem.*, 282; 9 *idem.*, 436; 3 *Johnson*, 235; 8 *Cowen's Reports*, 238; 2 *Mason's Reports*, 239; 4 *idem.*, 289.

2. Every party who suffers by the fraud of another, is entitled to be relieved against it, and the mode in which the relief shall be extended, will be adapted to the necessities of the particular case.

The courts of Louisiana have the same powers as a court of equity, and administer law and equity "*pari passu*." *New Orleans Building Company vs. Lawson*, 11 *Louisiana Reports*, 34. They are bound, therefore, to no prescribed forms of relief, but will vary their decrees to meet the very form and pressure of each particular case in all its complex habitude. *Story on Equity*, 419, 420.

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3. The vendors of Sanderson received the acceptances of Mr. Cochran in payment, and rely on them as payment.

By the *Louisiana Code*, article 2157, subrogation takes place of right for the benefit of him, who being bound with others, or for others, for the payment of a debt, had an interest in paying it. This legal subrogation is as extensive, as express subrogation could be; and authorizes the surety to use every right of the creditor, to the fullest extent. 2 *Martin, N. S.*, 159; 1 *Louisiana Reports*, 400; 6 *idem.*, 479.

4. Mr. Cochran, therefore, is legally subrogated to all the rights of those vendors of Sanderson, who have received and treated his acceptances as payment, and may use every means which they could have used, for security. 4 *Louisiana Reports*, 222.

5. The testimony shows further, that before the attachment in the case was levied, Mr. Cochran, having been warned against the frauds of Sanderson, had taken these goods into his own possession and appointed an agent to proceed with them to Texas, where he was to deliver them to Sanderson, if satisfied with the securities he could give, otherwise, he was to sell them on Mr. Cochran's own account, and remit to him the entire proceeds. This arrangement was made with the full knowledge and consent of Sanderson.

What interest, then, had Sanderson in these goods, at the time the attachment was levied?

An attaching creditor must show either possession or title in his debtor, and when a third person has the possession, he must show that his debtor had the title. *Taylor vs. Page et al.*, 8 *Louisiana Reports*, 135.

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Simon, J., delivered the opinion of the court. This is a case upon attachment. Plaintiffs sue to recover the amount of three promissory notes alleged to be due them by defendant; and a writ of attachment having been issued, the sheriff proceeded to attach a certain quantity of goods which had been previously shipped on board the schooner Oregon. Several creditors of the defendant intervened, and among them, A. G. Cochran, who alleges in his petition that the goods attached were purchased on his sole credit, that they were paid for in money and drafts advanced by him, and that the purchases were made in consequence of the fraudulent and deceitful representations of the defendant, who stated to intervenor that he was in good credit and doing a prosperous business in Texas, and who promised to pledge with the intervenor notes and titles to land in Texas, as collateral security, &c. He further states that a short time afterwards, having been apprized of the true circumstances of the defendant, a further arrangement took place between him and the intervenor, in consequence of which, defendant assigned and transferred over to him his title to the stock of goods then on board of the schooner Oregon, in consideration of the acceptances and liabilities which he was under for their purchase; that the goods were accordingly delivered to the intervenor, who put them in charge of his agent, and that, new bills of lading having been drawn up, his said agent was about going to Texas to dispose of the goods on the intervenor's account, and to remit the proceeds to meet the acceptances and liabilities of the intervenor, when said goods were attached at the suit of plaintiffs. He also avers, that the defendant never had the possession of the stock of goods, and that the same are not liable to the attachment sued out by plaintiffs.

Where a stock of goods are shown to have been purchased on the credit of a third party, under false and fraudulent pretences of the defendant, and the former takes them into possession, with a view to sell them and take up his drafts and acceptances given for the price, he will hold them against an attaching creditor of the defendant.

There was judgment in the court below in favor of the intervenor, and the plaintiffs appealed.

A careful examination of the evidence has convinced us that the goods attached were obtained by Sanderson on false and fraudulent pretences, and that they were purchased on the sole credit of the intervenor. It was also proven that a few

days before the attachment was levied, the goods had been put in the possession of the intervenor; that they were to be transported to Texas, on his own account, and that he had a right to consider himself the owner of those goods, at least for the purpose of providing, out of their proceeds, for the payment of the acceptances and liabilities which he had assumed.

In this situation, we think the intervenor, who is suffering by the fraud of another, is entitled to relief. If the original vendor of the goods were the claimants in this suit, there is no doubt of their being entitled to recover, as the contract for the sale of these goods would be vitiated by the fraud, and we are unable to perceive why the intervenor, on whose credit they were bought, and who, having assumed their payment, may perhaps be said to be subrogated to the right of the sellers, should be made the victim of the fraudulent acts of the defendant. It is clear that the acceptances of the intervenor were received in payment; he is, therefore, bound for another, and had an interest in discharging the obligations. *Louisiana Code, article 2157, section 3.* It is true that there is no evidence of the acceptances having been paid, but the discovery of the defendant's insolvency having been the cause of the delivery of the goods to the intervenor, this absence of proof of payment, ought not, in our opinion, to lessen his right of recovery; and under the circumstances of the case, we feel bound to extend towards the intervenor, the relief granted by law to a surety, who, even before making any payment, may demand to be indemnified by the principal debtor, when said debtor is in a state of insolvency. *Louisiana Code, article 3026, section 2.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

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A party suffering from the fraud of another, is entitled to relief; and where fraud would vitiate a contract of sale of goods, as between the original parties, a third party, on whose credit they were purchased, and who assumed payment, should not be made the victim of the fraudulent acts of the purchaser.

The same relief will be extended to an innocent party, who has become responsible for the contracts of another, by accepting his drafts and giving him his credit, as to a surety, who even before payment, may demand to be indemnified by the principal debtor, when the latter is in a state of insolvency.

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PARKHILL vs. CALDWELL.

PARKHILL

vs.

CALDWELL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where the appellee has the judgment corrected in part, it may be affirmed *with costs*, for such parts as are not altered.

The appellee cannot have damages as for a frivolous appeal, when he has the judgment corrected in any part himself.

This is an action against the maker of a note payable to his own order, nine months after date, *with six per cent. from its date*, until paid. The defendant pleaded a general denial. There was judgment for the amount of the note, with *eight per cent interest*, from maturity until paid. The defendant appealed.

Peyton, for the plaintiff, asked that the judgment be amended so as to give but six, instead of *eight per cent*, interest; and that it be affirmed, as to the other points, with ten per cent. damages.

Elmore and *King*, for defendant.

Morphy, J., delivered the opinion of the court.

This is a suit brought on a promissory note of seven hundred and thirty-six dollars and thirty-seven cents, bearing interest at the rate of six per cent. per annum, from its date, to wit: the 7th of April, 1838. The general issue was pleaded; the court below gave judgment for the amount of the obligation sued on, with eight per cent. interest thereon, from the 10th of January, 1839. The defendant took this appeal, in which the plaintiff joined, in this court, by praying that the decree be amended so as to allow the interest as stipulated in the note itself.

This case presents only a question of costs, which must be decided by article 888 of the Code of Practice. It provides that, "if the appellee has cause to complain of the judgment appealed from, he may, without appeal on his part, state in his answer the points on which he thinks he has

sustained wrong, and may pray that the judgment be reversed, with respect to them, and *confirmed with costs* on the rest."

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A computation of the interest, as given by the court below, and of that mentioned on the face of the instrument sued on, up to the date of the judgment appealed from, shows that at the time the appellee had cause to complain of it, although on a longer run of both rates of interest, that allowed would be more beneficial to him than that he is entitled to by the tenor of defendant's note.

The appellee has prayed for damages for the frivolous appeal; as he has availed himself of it to have the judgment amended, we do not think that any should be awarded to him.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs as to the amount decreed to plaintiff, but that the interest thereon shall run at the rate of six per cent. per annum, from the 7th of April, 1838, until paid, instead of that allowed by the judgment appealed from.

HOZEY, SHERIFF, &C. VS. M'DOUGALL ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT, JUDGE BUCHANAN
PRESIDING.

In an opposition arresting an order of seizure and sale, the issue is, as to the rights of the plaintiff to proceed with his order of seizure, and not as respects the distribution of the proceeds of the property when sold; and especially among parties not before the court.

In this case, Andrew S. Barker became the purchaser of a lot of ground sold under execution in the suit of James Erwin vs. John Wilcox, and after paying Erwin's debt, there remained a balance of two thousand and sixty-seven dollars

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and thirteen cents, which was claimed by trustees of certain creditors of Wilcox, under a conventional mortgage, to come in next after that under which the property was sold. Barker sold the premises to Madame Hester Matilda M'Dougall, for four thousand two hundred dollars; two thousand dollars in cash, and for the balance of two thousand two hundred dollars she gave her note, with mortgage on the property purchased. Barker transferred this note and mortgage, by authentic act, to F. Buisson, then sheriff, *and to his successors in office*, with all his rights, mortgages and privileges on said lot of ground; authorizing and empowering the sheriff to collect the amount of said note by sale of the property or otherwise, and retain of the proceeds in his hands the sum of two thousand and sixty-seven dollars and thirteen cents, for the payment of the amount due the creditors of John Wilcox, and the balance to be paid over to Barker, the transferor, after paying all charges and costs.

The present plaintiff, as the successor of Buisson, obtained an order of seizure and sale against the lot in question, when the sale was arrested by an opposition and rule taken by the defendant, Mrs. M'Dougall, on several grounds:

1. That the plaintiff, as sheriff, had no interest in the note, and could not maintain an action on it.
2. That this note is the property of the creditors of John Wilcox.
3. That Wilcox has failed and put this note in his schedule, and that a meeting of his creditors was about to take place, and that the syndic they might appoint, is the only person authorized to collect said note.

The judge, after hearing the parties on the rule, ordered the seizure and sale to go on, and the proceeds to be paid over to the syndic of Wilcox's creditors, who was not yet made a party. On motion of the defendant's counsel, the syndic, who was now notified, was required to show cause why the judgment should not be amended, so that the syndic should only receive the amount due of the sale of said property, by the late sheriff, to Wilcox's creditors, and the remainder, (except two hundred dollars which belongs to Barker,) to be

paid to the defendant. It was amended accordingly. Barker
appealed. EASTERN DIST.
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L. C. Duncan, for the plaintiff, insisted that the judgment be amended in this count, so as to direct the payment of the proceeds of the property sold to the plaintiff, to be appropriated and divided according to the act of transfer from Barker to his predecessor.

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Jacob Barker, for A. S. Barker, complained that the judgment was erroneous, and had been pronounced without any notice to him, who was a party interested.

2. There was error in requiring the proceeds of the sale to be paid to the syndic of Wilcox's creditors, who was not before the court, and had no interest whatever in the matter now in contest.

3. The judge had no power to amend his judgment as he did, after it was signed. All his power over it then ceased.

M^r Henry, for the defendant.

Morphy, J., delivered the opinion of the court.

The plaintiff having sued out an order of seizure and sale, on a note of two thousand two hundred dollars, placed in the hands of his predecessor, F. Buisson, for certain purposes set forth in an authentic deed of transfer and subrogation, executed to him by Andrew S. Barker. A rule was taken by defendant, for him to show cause why the said order should not be set aside, on the following grounds, to wit :

1. That the plaintiff had no interest in the note upon which the order had issued, and could not maintain any action on it.

2. That said note was the property of John Wilcox, but that the latter having failed, it belonged to his creditors.

3. That said note is set down on the schedule of Wilcox, and that the syndic then about to be appointed, was the only person empowered by law to collect said note.

As far as we have been enabled to understand the facts of this controversy, from an imperfect record and the statements of counsel, it appears that this note of two thousand two hun-

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dred dollars had been given by defendant in part payment of a lot of ground sold to her by Andrew S. Barker, and was secured by mortgage on the premises sold. That this lot had been seized as the property of John Wilcox, at the suit of James Erwin, and purchased at the sheriff's sale by Andrew S. Barker; that a conventional mortgage which existed on the property in favor of the trustees of certain creditors of John Wilcox, and which came immediately after that of Erwin, the seizing creditor, was overlooked and left out in the sheriff's sale to Barker; and that after satisfying Erwin's claim, there remained a sum of two thousand and sixty-seven dollars and thirteen cents coming to the said trustees. That to remedy this omission, Andrew S. Barker placed in the hands of the late sheriff, F. Buisson, this note of twenty-two hundred dollars, and subrogated him to all his rights and privileges as vendor, under a stipulation that of the amount of this note, when collected, a sum sufficient to pay the two thousand and sixty-seven dollars and thirteen cents, with interest and costs, should be held by the sheriff, subject to the order of the District Court, as if received by that officer in the suit of Erwin for the sale of said lot of ground, and that the balance should be paid over to him.

The judge below decreed that the order of seizure and sale should be proceeded on to execution, and that the avails of the sale should be paid over to the syndic of Wilcox's creditors, to be distributed according to law. A few days afterwards, this decree was modified at the instance of the defendant; and on a rule taken on plaintiff, and the syndic of Wilcox's creditors; the latter being thus, for the first time, brought in as a party to these proceedings. The sheriff, by this new order, was directed to pay to the syndic only the sum of two thousand and sixty-seven dollars and thirteen cents, and to hand over to defendant the balance of the money, after deducting the difference between that sum and the amount of the note, which difference was decreed back to Andrew S. Barker. From these decrees the present appeal has been taken. It appears to us that the only issue made up between the original parties below was on the right

of plaintiff to proceed with his order of seizure and sale; after pronouncing on it, the judge went on, improperly we think, to adjudicate on the rights of parties not before him, without giving them any notice or affording them an opportunity of being heard. The defendant, out of whose property the sum of two thousand and two hundred dollars was to be levied, was without interest to control or discuss its distribution. It was perfectly immaterial to her to whom it was paid, had the parties been heard, for whose benefit the arrangement made with the late sheriff was intended, they might perhaps have shown that their right to receive this sum of two thousand and sixty-seven dollars and thirteen cents, as mortgage creditors of Wilcox, out of the proceeds of the property sold at the suit of Erwin, existed long before the failure of Wilcox, and that said sum should not go into the hands of the syndic as decreed by the judge *a quo*.

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In an opposition arresting an order of seizure and sale, the issue is, as to the rights of the plaintiff to proceed with his order of seizure, and not as respects the distribution of the proceeds of the property when sold, and especially among parties not before the court.

It is therefore ordered, that the judgment and amended judgment of the District Court, on the rules taken to set aside the order of seizure and sale, and for the distribution of the proceeds of said sale, be avoided, annulled and reversed; and proceeding to give such judgment, as in our opinion, should have been given in the court below; it is further ordered, adjudged and decreed, that the order of seizure and sale granted by the District Court be reinstated, and an alias order issue directing the mortgaged premises, described in the plaintiff's petition, be seized and sold; and out of the proceeds a sufficient sum be paid over to the sheriff of the parish of Orleans, to pay the note described in the act of mortgage, to wit: two thousand sixty seven dollars and thirteen cents, with interest at the rate of ten per cent. per annum, from the 24th day of March, 1837, until paid, to be applied under direction of the District Court, according to the conditions expressed in the act of subrogation, from Andrew S. Barker to F. Buisson, late sheriff. The appellees paying costs of the appeal.

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ELKINS'S HEIRS vs. BERRY.

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vs.
BERRY.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The Court of Probates is *without* jurisdiction in an action on an appeal bond, or to try a rule against the surety therein, to render him liable for the judgment against his principal, although the appeal was taken from that court.

This is in the nature of an action on an appeal bond against the surety in the Court of Probates. The plaintiffs having obtained a judgment in the Probate Court against the late N. Cox, as administrator of the estate of the late Samuel Elkins, deceased, a suspensive appeal was taken to the Supreme Court, with Jeremiah Berry as surety; which judgment was affirmed, with damages. The final judgment remaining unpaid, the plaintiffs took a rule in the Court of Probates, from whence the appeal was taken, on the defendant, and notice was given that at the expiration of ten days, they would apply to the court for judgment against him as surety in the appeal bond, for the amount of the final judgment obtained by them against N. Cox.

The defendant excepted to the rule or order of court, on several grounds, and that the Court of Probates had no jurisdiction of the subject matter set forth, but that the same belonged exclusively to the courts of general and ordinary jurisdiction.

The judge of probates sustained this exception, and discharged the rule. The plaintiffs appealed.

J. Slidell, for the plaintiffs.

L. C. Duncan, contra.

Morphy, J., delivered the opinion of the court.

On a suggestion to the court below, that N. Cox had died, and that his estate had been declared insolvent, and directed to be administered on by a syndic, a rule was taken on J. Berry as surety on an appeal bond, to show cause why

judgement should not be rendered against him, for the amount of the decree obtained against Cox in this case, to wit: the sum of thirty thousand nine hundred and ten dollars and sixty-one cents, with five per cent. damages thereon, interest from the 3d of December, 1836, (the day of the death of N. Cox), and costs of suit. The defendant appealed, and among other means of defence, pleaded to the jurisdiction of the Court of Probates. The opinion we have formed on this plea, will make it unnecessary for us to examine any of the other questions raised by the pleadings.

Courts of Probate are of limited jurisdiction; their powers are specially defined in article 924; and article 925 provides that they shall have no jurisdiction, except in the cases enumerated in the preceding article, &c. Nothing in that article, or any other part of the code, can give them cognizance of a case of this kind. This is a general action, in which the defendant is entitled to all the rights and privileges secured to suitors by the general provisions of the Code of Practice. Some of those rights cannot be extended to them in the Court of Probates, from the very nature of its organization. It might be said that article 596, provides a summary proceeding by which judgment can be obtained against sureties on an appeal bond, in the very court from which an appeal has been taken; and that, thereby, jurisdiction is given to the Court of Probates, *quo ad hoc*. This provision, we think, should be understood as applying only to courts of ordinary jurisdiction. To extend it to Courts of Probate, would be to enlarge their powers by implication; a thing which we are not prepared to do. When an adequate remedy can be obtained in the ordinary courts, by an action on the appeal bond, it is essential that courts of limited jurisdiction should move within the circle chalked out to them by law. In cases of doubt, we would be more inclined to restrain than extend their powers.

It is, therefore, ordered, that the judgment of the Court of Probates be affirmed, with costs.

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ELKINS'S HEIRS

VS.

BERRY.

The Court of Probates is without jurisdiction in an action on an appeal bond, or to try a rule against the surety therein to render him liable for the judgment against his principal, although the appeal was taken from that court.

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May, 1840.

SHERBURNE
vs.
ORLEANS COTTON
PRESS.

SHERBURNE vs. ORLEANS COTTON PRESS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where an engineer of a cotton-press was employed by the year at a fixed salary, and was discharged before the end of the year, without any other cause than that his services were no longer required by the company, it was held that he is entitled to recover his salary for the whole term.

The engineer was entitled to receive his full salary as soon as he was discharged; and no condition could be afterwards imposed by his employer, to return and perform his service for the remainder of the year.

This is an action by the engineer lately employed by the Orleans Cotton Press, to recover his full year's salary. He shows that he was regularly employed, under a resolution of the company, for one year, from the 24th February, 1835, with a salary of twelve hundred dollars per annum; and that, on the 19th September following, he was discharged, by an official note from the secretary of the company, stating "that his services were no longer required." He immediately notified the company that he should claim his salary for the whole year. About a month afterwards, the president of the company told him if he intended to claim his salary for the year, he must come and stay the year out, which he refused. The defendants pleaded a general denial. Upon these facts and issues, the cause was tried. Each party rendered an account.

The district judge was of opinion that there was only one month's salary due the plaintiff: from the 19th September, the day of his discharge, to the 19th October, when he was told to return and stay his year out; that by refusing, he had no further recourse on the company. Judgment was given for only one hundred dollars and eighty-three cents; and the plaintiff appealed.

Ives and M'Caleb for the plaintiff.

Lockett, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which rejects his claim for full wages, as engineer, employed by the defendants, and discharged before the expiration of his term. His wages were fixed by a resolution of the board of directors of the Cotton Press, at twelve hundred dollars per annum, from the 24th February, 1835, and he was discharged the 19th September following.

The district judge was of opinion, as the hiring was by the year, the defendants had no right to discharge the plaintiff until the end of his term; and that he would be entitled to his whole wages, if he had not been told by the president of the defendant's company, about a month after his discharge, that if he intended to claim his wages for the whole year, he must come and stay the year out; which he refused: that this was a countermand of the discharge, and the plaintiff was bound to complete his term to entitle him to the wages. He was allowed an additional month's wages, up to the 19th October, 1835; and had judgment for one hundred dollars, from which he appealed.

It appears to us that the District Court erred. The Louisiana Code, article 2720, provides, that "if, without any serious ground of complaint, a man should send away a laborer, whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salary which he would have been entitled to receive, had the full term of his services arrived." The plaintiff, in this case, was discharged because the defendants "had no longer any use for his services." They thereby put an end to their contract with him, and he was at liberty to look for employment elsewhere. His claim on them was for the salary agreed upon for one year. The president of the company had not the right to impose on him, one month afterwards, the obligation of returning to the service of the defendants, and laboring for them until the end of the year, as a condition *sine qua non* to his receiving what he was then entitled to under the code. His right to his full salary accrued as soon as he was discharged.

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SHERBURN
VS.
ORLEANS COTTON
PRESS.

Where an engineer of a Cotton Press was employed by the year, at a fixed salary, and was discharged before the end of the year, without any other cause than that his services were no longer required by the company, it was held that he is entitled to recover his salary for the whole term.

The engineer was entitled to recover his full salary as soon as he was discharged; and no condition could be afterwards imposed by his employer, to return and perform his service for the remainder of the year.

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KELLOGG ET AL.

VS.

CLARK.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered and decreed, that the plaintiff recover from the defendants the sum of five hundred and sixteen dollars, and sixty-six cents, with costs in both courts.

KELLOGG ET AL VS. CLARK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

All the intervening parties to a suit, having an interest in the judgment, must be made parties to the appeal, or it will be dismissed.

This is an action against the defendant, captain Clark, of the steamer Brilliant, as drawee and acceptor of a draft. There was a confession of judgment, with privilege on the steam-boat for the amount of the draft. Manning and Wilson intervened and made opposition, and prayed to have their claims against said steam-boat allowed, by privilege and preference over other creditors, being for supplies furnished.

The boat's crew, and others, presented privileged claims against the boat, which *were ordered to be paid*, as such, out of the proceeds of sale.

Judgment was given, allowing only part of the claims of Manning and Wilson, and they appealed. The original plaintiffs, Kellogg, Kennett & Co., and the defendant, Clark, were alone made appellees, while there were many other claimants, who had also had judgment to be paid out of the proceeds of the boat.

G. B. Duncan, for the plaintiffs.

M. Millen, for the appellants.

Martin, J., delivered the opinion of the court.

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SHIPMAN & AYRES

VS.

HAYNES ET AL.

Judgment having been confessed with a privilege on the steam-boat *Brilliant*, a considerable number of claimants intervened and presented claims for wages, supplies, &c., with a like privilege on the proceeds of the boat, two of whom, to wit: Manning and Wilson, are appellants from the final judgment settling the claims and privileges of the plaintiffs and intervening parties. The plaintiffs and defendant are the only appellees.

The appellants complain that they have not been allowed the privilege to which they were legally entitled. As a reversal of the judgment must affect the rights of the other intervening parties who have had their privileges allowed; and, as the allowance of new privileges must diminish the funds out of which these privileged claims are to be satisfied, *all the intervenors* ought to have been parties to this appeal; because, any change in the judgment must *affect their rights*. Whoever claims relief at our hands against a judgment, must bring before us all the parties thereto, who have an interest in its remaining undisturbed.

All the intervening parties to a suit having an interest in the judgment, must be made parties to the appeal, or it will be dismissed.

The appeal must, therefore, be dismissed, with costs.

SHIPMAN AND AYRES VS. HAYNES ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where the plaintiffs' attorney *consented* that the facts set forth in certain interrogatories propounded to them by the defendants, touching the ownership of the note sued on, should be *taken for granted*, in order to prevent delay in the trial; the admission or confession cannot be recalled or disregarded, and the party may avail himself of it after judgment.

This is an action by George P. Shipman and Thomas N. Ayres, residing in New-York, on the following promissory note:

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SHIPMAN & AYRES
VS.
HAYNES ET AL.

"New-Orleans, 13th November, 1838.

"Thirteen months after date, we severally and jointly promise to pay to the order of H. Haynes, nine hundred and seventy-seven dollars and ninety-six cents, for value received."

S. HAYNES,
JACOB SHAUB."

Endorsed. "HENRY HAYNES."

The plaintiffs allege, that Shaub is absent from the state, and pray an attachment against him, and for judgment, *in solido*, against all the defendants.

The defendants admitted their signatures; and denied that the plaintiffs were owners of the note; that it was the property of William B. Ayres, and the proceeds to go to his benefit; they also aver that he is indebted to one of them, in the sum of three thousand seven hundred dollars, for moneys advanced and services rendered, which they set up in compensation. They also propounded interrogatories, requiring the plaintiffs to answer separately, in substance, that Wm. B. Ayres was the true owner of the note, and that the proceeds, when collected, were to be remitted to him.

The plaintiffs' counsel declined having these interrogatories answered, as they resided in New York, and it would have a tendency to delay the trial. Their counsel also consented that the interrogatories might be taken for confessed.

There was judgment against the makers of the note, and and one of non-suit in favor of the endorser.

Execution issued on this judgment, and six hundred dollars was made out of the sale of 40 shares of Firemen's Insurance stock standing in the name of Shaub, the absent defendant.

In the mean time, Stewart Haynes, one of the defendants in the execution, obtained a judgment in the Parish Court for three thousand six hundred and eighty dollars and eleven cents against Wm. B. Ayres; and he took a rule on the plaintiffs and sheriff to show cause why the money made on the execution, should not be paid over to him, in part satisfaction of this judgment; and adduced as evidence, that the money belonged to said Ayres, the *confession of defendants'* interrogatories by the plaintiffs in this suit, through their

attorney. The plaintiffs' attorney offered his own testimony to show that the admission was made for the sole purpose of preventing delay, and to facilitate the trial of the suit, and was not binding in this case.

The judge presiding was of opinion it was competent for the attorney to make the confession, or consent, on behalf of the plaintiffs, that the interrogatories be taken for granted, and having been made, it could not be recalled or retracted. He gave judgment on the rule ordering the money to be paid over to S. Haynes. The plaintiffs appealed.

G. B. Duncan, for the plaintiffs.

F. Haynes, contra.

Morphy, J., delivered the opinion of the court.

This suit was brought on a note of hand, drawn by two of the defendants, and endorsed by the other. The defence set up was, that the note did not belong to the plaintiffs, but was the property of Wm. Ayres, the brother of one of them, who was largely indebted unto Stewart Haynes, one of the defendants, which debt was pleaded in compensation against the demand of plaintiffs; and interrogatories were put to the latter to ascertain whether the said Wm. Ayres was not really the owner of the note, and would not receive from them the amount of it when collected. Plaintiffs' counsel consented that the facts set forth in the interrogatories should be taken for granted, and they proceeded to trial. No proof having been administered of any sum being due by Wm. Ayres to any of the defendants, the plaintiffs had judgment, and on execution being issued, a sum of six hundred dollars was levied, by the sale of forty shares of the capital stock of the Firemen's Insurance Company, belonging to Jacob Shaub, one of the defendants. In the mean time, Stewart Haynes having obtained in the Parish Court a judgment against Wm. Ayres, for three thousand six hundred and eighty dollars and eleven cents, seized the moneys made in this suit as belonging to his debtor, and took a rule on the

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SHIPMAN & AYRES
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Where the plaintiffs' attorney consented that the facts set forth in certain interrogatories propounded to them by the defendants, touching the ownership of the note sued on, should be taken for granted, in order to prevent delay in the trial, the admission or confession cannot be recalled or disregarded, and the party may avail himself of it after judgment.

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**M'COY'S EXECU-
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 BYRNE.**

plaintiffs and the sheriff, to show cause why the said moneys should not be paid over to him in satisfaction of his judgment against Wm. Ayres. This rule being made absolute, the plaintiffs appealed.

On the trial of the rule, the plaintiffs' attorney attempted to recall his admission of Wm. Ayres' ownership of the note sued on, by offering his testimony to prove that, as his clients resided in New-York, where it would have been necessary to send the interrogatories, he made the admission for the sole purpose of preventing delay, and enabling Haynes to offer any defence which he might have to make against the plaintiffs or Wm. Ayres. The court below properly disregarded this testimony ; it could not destroy the legal effects of an admission which the attorney was competent to make. S. Haynes being a party to the suit in which this admission was made, we see no good reason why he should not be permitted to avail himself of it after the judgment, as he could have done on the trial ; by the course pursued, the same result has been reached, which he sought to obtain under his pleadings.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs.

M'COY'S EXECUTORS VS. BYRNE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the evidence is contrary to the judgment appealed from, it will be reversed, and such a one rendered as is supported by the proof in the record.

This is an action against Charles Byrne, and three others, for auction commissions due to the late Isaac L. M'Coy. The petition charges that the defendants are indebted in the sum of one thousand nine hundred and six dollars for the amount of commission and charges on the sale of thirty-one

lots amounting to ninety-five thousand and three hundred dollars. Judgment is prayed against the defendants, four in number, *jointly and severally* for said sum. An account of sales, commission and charges is annexed.

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Byrne answered and pleaded a general denial. The suit was discontinued as against the other defendants. The only piece of evidence in the record is an account in M'Coy's hand-writing, showing Byrne's proportion of the commission and charges to be five hundred and fifty-seven dollars and twenty cents.

The district judge was of opinion the plaintiffs had made out their case for seven hundred and twenty-two dollars and forty cents; gave judgment accordingly, and the defendant appealed.

Strawbridge, for the plaintiffs.

Worthington, contra.

Morphy, J., delivered the opinion of the court.

The plaintiffs claim one thousand nine hundred and six dollars for commissions due the late Isaac L. M'Coy, as auctioneer on the sale of thirty-one lots of ground made for account and by order of defendants, Byrne and others. Charles Byrne filed for his separate answer, a general denial. Judgment having been rendered against him for seven hundred and twenty-two dollars and forty cents, he appealed.

The only evidence which the record exhibits is a document introduced by the defendant himself; it is an account admitted to be in the hand-writing of M'Coy, showing the amount of the sales made, and the commissions on them; the deductions allowed for such sales as were not carried into execution, &c. From this paper, the proportion to be paid by the appellant of the commissions claimed would appear to be five hundred and fifty-seven dollars and twenty cents, instead of seven hundred and twenty-two dollars and forty cents, allowed by the judge below. How this latter sum has been arrived at we are at a loss to conjecture, from any thing to be found in the record.

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BLIHER
VS.
HOWELL AND
JOHNSON.

It is, therefore ordered, that the judgment of the District Court be avoided and reversed ; and it is further ordered, that Horace C. Cammack and William M'Cawley, testamentary executors of Isaac L. M'Coy, deceased, do recover of said defendant, Charles Byrne, five hundred and fifty-seven dollars and twenty cents, with costs in the court below ; those of this appeal to be borne by the plaintiffs and appellees.

BLIHER VS. HOWELL AND JOHNSON.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Appeal dismissed, because there was neither statement of facts, bills of exception, or assignment of errors, to enable the court to try the case on its merits.

This is an action on a due bill, payable to J. Shill & Co., and by them transferred to the plaintiff. Judgment by default was made final without any appearance of the defendants ; and from which they appealed.

Bartlette, for plaintiff.

Randall, contra.

Morphy, J., delivered the opinion of the court.

The defendants have appealed from a judgment decreeing them, *in solido*, to pay the amount of a due bill which they had subscribed in favor of John Shill & Co., and which the latter transferred to plaintiff. The record contains no statement of facts, or bills of exceptions ; nor is there any assignment of errors as apparent on its face, regularly made in this court, as required by the Code of Practice, articles 586, 896, 897.

It is, therefore, ordered, that this appeal be dismissed, at the cost of the appellants.

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COTTON VS. UNION BANK OF LOUISIANA.

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APPEAL FROM THE COMMERCIAL COURT FOR THE CITY OF NEW-ORLEANS.

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VS.
UNION BANK OF
LOUISIANA.

Possession of a negotiable note endorsed in blank, will authorize the holder to recover on it, when his authority is not specially denied, or the contrary shown.

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The defendants cannot avail themselves of a defence against their liability to pay a certain sum, on the ground that the plaintiff's agent, who employed them, was indebted to them, when this matter is not specially pleaded. The plea of the general issue is not sufficient.

This is an action against the Union Bank of Louisiana, to recover the amount of a promissory note, which they failed to have protested in due time, and notice thereof given to the endorsers, by which they were released. The defendants pleaded a general denial.

The note is for one thousand dollars, signed by D. S. Parrish, payable to the order of J. P. Overton, and by him endorsed in blank. It was also endorsed by James Noe and Lewis Hord, with a special endorsement by J. E. Robins, cashier of the Commercial and Rail-road Bank of Vicksburg, to the cashier of the Union Bank of Louisiana, for collection.

The note was dated, New-Orleans, March 20, 1836, and payable four months after date; but was not protested until the 28th July. The cashier of the Vicksburg Bank swears that he did not know who was the owner, but that Lewis Hord, the last endorser, put it in the Vicksburg Bank for collection, and it was sent in due time to the defendants, in New-Orleans, where it was dated.

The plaintiff sued as holder, but there was no evidence to show how he came in possession of it.

There was judgment against the defendants, for the amount of the note, and they appealed.

Peyton, for the plaintiff.

Labarre, contra.

Martin, J., delivered the opinion of the court.

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VS.
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LOUISIANA.

The defendants are appellants from a judgment by which the plaintiff recovered the amount of a promissory note, which he alleges was sent to the defendants for collection, by his agent, the cashier of the Commercial and Rail-road Bank of Vicksburg; and which was not protested in due time, by which the plaintiff lost his recourse against the endorsers who were at the time good and solvent.

The defendants do not deny their liability, but urge, that the plaintiff is a stranger to them, as they received the note from the bank at Vicksburg, for collection, and which is largely indebted to them.

The plaintiff's name is not on the note, and the testimony shows that it was lodged in the bank at Vicksburg, by one Lewis Hord, who now appears as the last endorser thereon: a special endorsement by the cashier of the Vicksburg Bank, to the cashier of the Union Bank, at New Orleans, on sending the note to the latter for collection, having been stricken out. There are two blank endorsements before that of Hord, the first of which was that of the payee. The plaintiff contends that his possession of the note with the blank endorsement of the payee, shows that he is the owner of it; and that the evidence shows the Bank of Vicksburg received it solely for collection, and has no interest therein. His counsel, therefore, insists, that the Bank of Vicksburg, being without interest in the note, acted as the agents of the owner, and that by delivering the note to the plaintiff, they have recognized him as the owner. The argument drawn from the circumstance of the defendants being creditors of the Vicksburg Bank cannot avail them, because this was not pleaded, the defence being a general denial only. A witness swears that the Vicksburg Bank was indebted to the defendants at the time he deposes, but not before the inception of the suit, nor at the time the answer was filed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

DEREPAS VS. SHALLUS.

EASTERN DIST.
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

DEREPAS
VS.
SHALLUS.

Legal interest is the only damages allowed for delay in the performance of an obligation to pay money, but cannot apply or be taken as the measure of damages, when the obligation is destroyed by the dissolution of the contract, and in an action for the rescission of a sale.

On the dissolution of a sale the vendor is entitled, not only to take back his property, but to recover the fruits of the thing sold, during all the time the purchaser had it in possession, *as the rent* of a house and lot.

A provisional seizure is insufficient to bring an absent defendant into court; but when a curator *ad hoc* is appointed, it is sufficient.

The vendor has no privilege or lien on the furniture left in the house, when it is abandoned or left by his vendee, and he sues for the rescission of the sale. He can only claim his rent. The privilege grows out of the contract of lease, or relation of landlord and tenant.

This is an action to rescind the sale of a house and lot, made by the plaintiff to the defendant, Henrietta Shallus, widow of W. C. Clark. He alleges, that she has abandoned the premises, and gone to Texas, leaving some furniture in the house, and failed to pay her notes, given for the price of the property. The plaintiff prays that the sale be rescinded; that he have judgment for the return of the property, and the fruits or rents for the time the defendant had it in possession; that the furniture remaining in the house be provisionally seized, and a curator *ad hoc* appointed to defend.

A curator was appointed, and service of petition and citation duly made on him. He pleaded a general denial, and denied specially that the plaintiff had any claim for rent, as the defendant was the owner, and had no right to disturb the furniture or effects in the house, or to sue out a writ of provisional seizure. He also sets up a claim of five hundred dollars, in reconvention for damages sustained by the illegal proceedings of the plaintiff.

The evidence showed that the defendant has left the country, and was living in Texas. Her notes were produced, unpaid. It was, also, proved that the rent of the premises

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was worth forty dollars per month; that some injury was done in breaking locks in getting into the house and armoire, &c., but the furniture had been inventoried, and carefully stored away.

There was judgment rescinding the sale, and decreeing the possession and ownership of the property to the plaintiff, together with two hundred and eighty dollars for the damages he sustained. The defendant, some time after, took a devolutive appeal.

D. Seghers, for the plaintiff.

Bartlette, for defendant and appellant, assigned sundry errors as apparent on the record. [Those that are material, are noticed in the opinion of the court.]

Morphy, J., delivered the opinion of the court.

This action is brought to annul the sale of a house and lot. The plaintiff alleges, that on the first of March, 1837, he conveyed to defendant this property, for the sum of four thousand five hundred dollars, which he received in her two endorsed notes, of two thousand two hundred and fifty dollars each, payable at six and twelve months, and secured by mortgage on the premises sold; that the first of these notes was, at maturity, protested for non-payment, and remains unpaid; that some time after the sale, defendant departed from the state and went to Texas, without leaving any agent or person entrusted with her affairs, but that she left some articles of furniture shut up in the house, purchased of him. The plaintiff annexed to his petition the two notes received of defendant, and prayed that the sale be avoided and annulled, and that the defendant be decreed to pay him, as damages, the rent of the house from the first of March, 1837, until the first of October following: he, moreover, sued out a writ of provisional seizure against the furniture and effects in the house, on which he asserted a lien and privilege to secure the payment of the rent; and at his instance the court appointed a *curator ad hoc*, to represent the absent

defendant. The latter pleaded the general issue, at the same time specially denying the plaintiff's right to any rent, and claiming damages in reconvention, to the amount of five hundred dollars for the illegal seizure and removal, from the house, of the furniture of the defendant.

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DENEPAN
VS.
SHALLON.

There was a judgment given in favor of the plaintiff, from which, some time after, this devolutive appeal was taken.

The appellant has placed her case before us on a long assignment of errors, as apparent on the face of the record. Of these, it is deemed proper to notice only the following, to wit:

1. That the obligation of defendant being for the payment of a sum of money, the plaintiff was entitled, on a breach of it, to no other damages than the legal rate of interest.

2. That a writ of provisional seizure has not the effect of an attachment to bring a party into court; and if it has, the petition and citation in this case were not legally served.

3. That the claim set forth in plaintiff's petition, is not one authorizing a writ of provisional seizure.

I. The article 1929 of the Louisiana Code, to which we have been referred, provides that legal interest shall be the only damages allowed for delay in the performance of an obligation to pay money. It is obvious that this provision contemplates only those cases in which such an obligation is sought to be enforced, and cannot apply when, as in the present case, the obligation to pay is itself destroyed, by the dissolution of the contract which gave rise to it: interest being but an accessory of the price, none can be claimed or allowed, when there is no price to be paid. The effect of the dissolution of a sale, is to replace the parties in the situation in which they stood before the contract. The vendor is entitled, not only to take back his property free from any incumbrance, but also to recover from the purchaser, the fruits of the thing sold, during all the time the latter has had it in his possession. 2 *Troplong, Traité de Vente, No. 652; Pothier, Vente, No. 357, 358.* The rents of a house are the fruits which that kind of property is susceptible of producing;

Legal interest is the only damages allowed for delay in the performance of an obligation to pay money; but cannot apply, or be taken as the measure of damages, when the obligation is destroyed by the dissolution of the contract, and in an action for the rescission of a sale.

On the dissolution of a sale, the vendor is entitled, not only to take back his property, but to recover the fruits of the thing sold, during all the time the purchaser had it in possession: as the rent of a house and lot.

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EASTERN DIST. and the evidence in this case, shows that the house in question yielded forty dollars per month.
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A provisional seizure is insufficient to bring an absent defendant into court; but when a curator *ad hoc* is appointed, it is sufficient.

II. Had no other step been taken in this case than the provisional seizure sued out by plaintiff, we would have no hesitation in declaring that defendant has never been properly brought into court, but this writ, we believe, was not intended to produce any such effect. A curator *ad hoc* was appointed to the defendant, under article 57 of the *Louisiana Code*, which provides for such an appointment when the person to be sued has no agent or representative in the state; service of citation has been regularly made on this curator. It has more than once been held that, under our laws, such a proceeding is binding on the absentee. *Louisiana Code*, article 57; *Code of Practice*, article 116; 4 *Louisiana Reports*, 154, *Zacharie vs. Blandin*; *Idem.*, 606, *George vs. Fitzgerald*.

The vendor has no privilege or lien on the furniture left in the house, when it is abandoned or left by his vendee, and he sues for the rescission of the sale. He can only claim his rent. The privilege grows out of the contract of lease, in relation of landlord and tenant.

III. We think the order of provisional seizure issued improvidently in this case. The plaintiff, although entitled to the rents of the house, as damages or fruits to be paid by defendant, had no lien or privilege on her furniture. This privilege grows out of the contract of lease, which never existed between them. She occupied this house as owner, not as plaintiff's tenant. But although unwarranted by law, this step appears, from the evidence, to have been rather beneficial than injurious to the interests of defendant; her own conduct had rendered necessary some measure of this kind, for she had abandoned all her furniture and effects in the house, and the plaintiff was entitled to regain the possession. In execution of this order of court, the sheriff took an inventory of the property, in presence of the curator *ad hoc*, and had it removed to his store, without any material damage. The premises being thus cleared, were, with the consent of the defendant's legal representatives, forthwith rented out by plaintiff; thus preventing a further accumulation of the rents, for which defendant would have been answerable.

Upon the whole, we are of opinion that the judgment appealed from should not be disturbed. Its correctness is not

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affected by the illegality of this provisional seizure, from **EASTERN DISTRICT** which no injury is shown to have resulted to the defendant. **May, 1840.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

**CARLILE
vs.
HOLDSHIP.**

CARLILE vs. HOLDSHIP.

**APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT, JUDGE
BUCHANAN PRESIDING.**

Where the curator of a deceased plaintiff is made a party by order of court, after the *contestatio litis*, and is represented by counsel, the case may proceed to trial without any other delay or notice, and the proceedings will be regular.

Where the notary states that he "demanded payment of the note at the bank therein specified," it is a sufficient legal demand.

This is an action against the endorser of a promissory note.

The defendant pleaded a general denial. He admits he endorsed the note, which was for the joint account of the maker Thomas Williams, the plaintiff, Carlile, and himself; that they had entered into partnership, to carry on the business of an iron foundry, and the amount or proceeds of the note used for the purposes of the partnership, contemplated at the time it was drawn; but the plaintiff seeing the business was not prosperous, threw the burden of the partnership upon this respondent and Williams, who lost thereby a large amount of money, far exceeding the proportionate amount of the note; he, therefore, reconvenes the plaintiff in the sum of one thousand five hundred dollars, for losses incurred and payments made on account of the firm, for which he prays judgment, and that the plaintiff's demand be rejected.

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CARLILE
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After the cause was at issue, on the 2d December, 1839, on motion of the plaintiff's counsel and suggesting his death, it was ordered that his curator be made a party. On the same day, the cause was taken up for trial; but at the instance of plaintiff's counsel, it was postponed until the 16th of the month, and the defendant notified thereof.

On the 17th of December, the case came on for trial. The plaintiff offered in evidence the note, protest, and notice to the defendant as endorser; and also the letters of curatorship of the plaintiff from the Court of Probates. The defendant objected to go to trial, on the ground that the curator had not taken any steps or appeared in the case, and that the defendant was not notified of plaintiff's death, or of a curator being appointed, and could not, therefore, avail himself of any plea or defence against the curator or the heirs of the deceased.

The objections were overruled, and the defendant's counsel took his bill of exceptions. He also excepted to the protest being received in evidence, because it did not state that *the note had been presented* to the Union Bank, where demand of payment was made. The notary states that he "*demand[ed] payment of said note at the bank therein specified*, and was answered that no funds had been provided to pay the same."

There was judgment for the plaintiffs, and the defendant appealed.

Preston, for the plaintiff.

Soulé, contra.

Bullard, J., delivered the opinion of the court.

This is an action against the endorser of a promissory note. The plaintiff having died after issue joined, it was ordered that the curator of his estate be made a party. Judgment having been pronounced in his favor, the defendant appealed. He relies on two bills of exceptions. From the first, it appears that the defendant's counsel objected to the case being taken up for trial until the curator, who had been made a party on the suggestion of the plaintiff's death, had taken

some step in the case ; that, until then, he had not appeared in any manner, and that the defendant was not notified that the original plaintiff was dead, and he could not avail himself of any plea which he might have against the curator, or the heirs. But the court permitted the plaintiff to proceed to trial, the judge adding that the counsel had stated himself to be counsel for the curator.

In support of this bill of exceptions, the counsel relies upon the case of *Liquet's Heirs vs. Peirce*, 5 *Louisiana Reports*, 363. In that case, after the death of the original plaintiff, his heirs came in by a supplemental petition, and the court held that it was irregular to proceed to trial, without service of a copy of the heirs' petition. In the present case, the curator of the deceased plaintiff's estate, was made a party by order of court, after the *contestatio litis*, and appears to have exhibited his authority from the Court of Probates, and was represented by counsel.

We think the proceeding regular, and that the court did not err.

The second bill of exceptions was taken to the introduction of a protest of the note, which had been objected to on the ground that it did not show that the note had been presented for payment. The counsel relies on the case of *Warren vs. Briscoe*, 12 *Louisiana Reports*, 473.

The notary states in his protest, that he "demanded payment of the said note at the bank therein specified." It appears to us as it did to the district judge, that it is to be inferred, from the whole tenor of the protest, that the note was produced and presented for payment at the time and place specified therein. In the case of *Warren vs. Briscoe*, the notary states, merely, that "he went to the Planters' Bank, Natchez, and was informed by the teller there was no funds," &c. No demand was certified, and it could not be inferred, from any part of the protest, that the notary took the note with him, much less, that he had made any demand.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the curator of a deceased plaintiff is made a party by order of court, after the *contestatio litis*, and is represented by counsel, the case may proceed to trial without any other delay or notice, and the proceedings will be regular.

Where the notary states that he "demanded payment of the note at the bank therein specified," it is a sufficient legal demand.

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MERCHANTS'

BANK

vs.

GOVE.

MERCHANTS' BANK vs. GOVE.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

A party cannot recover back usurious interest or discount, which he has voluntarily paid, either by a direct action or exception.

A plea in compensation and reconvention, setting up different matters, in no way connected with the plaintiff's demand, will be rejected.

This is an action against the maker and endorsers of a promissory note, secured by mortgage.

Gove, one of the endorsers, denied every allegation, and set up in defence, that on the 1st of August, 1837, the Merchants' Bank, (plaintiffs,) which is not authorized, by its charter, to take more than seven per cent. interest, per annum, discounted two notes for him, (defendant,) bearing each ten per cent. interest per annum, and which were made payable to a third person as payee and endorser, at the instance of the plaintiff, to evade the law and the charter; and that for the loan of one thousand and forty dollars, they required, and did receive in payment, at the end of one year, one thousand one hundred and forty-four dollars; and on the second note of one thousand and forty dollars, at the end of two years, they received one thousand two hundred and forty-eight dollars; making in all, an excess of three hundred and twelve dollars over seven per cent., the highest rate of interest authorized by the charter of said bank.

The defendant avers, that this sum was usuriously and illegally demanded and received from him by the plaintiffs, and which he pleads as a demand in compensation and reconvention of this action.

There was judgment against all the other defendants, by default.

The evidence showed that the note sued on, is the property of the Merchants' Bank; and that the two notes mentioned in the answer and plea of reconvention, were given to the United States Bank of Pennsylvania, in payment of exchange purchased by the defendant, and protested for non-

payment, while held by the United States Bank; that the Merchants' Bank only acted as the agent of the former, and has never purchased exchange, at least up to the time of giving the note now sued on.

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There was judgment against the defendant, for the balance due on the note in suit, and he appealed.

There was an affidavit filed for a new trial, on the ground of newly discovered evidence, that defendant can prove an equitable defence, and offset to the note in suit. This motion was overruled.

T. Slidell, for the plaintiff, insisted on the affirmance of the judgment, with damages.

Durell, for the defendant and appellant.

1. The plea in reconvention ought to have been allowed by the court below, because it was in proof that the Merchants' Bank, in all its transactions with the defendant, Gove, held itself out as principal.

2. The judgment of the court below, overruling the motion for a new trial, was erroneous, after the affidavit taken and filed as the basis of said motion.

Martin, J., delivered the opinion of the court.

The defendant is appellant from a judgment which rejects his claim, in compensation or reconvention, for an excess of discount or interest, between the rate of seven per cent., the maximum which the charter of the Merchants' Bank authorizes it to take, and that of ten per cent., which it received on two notes theretofore discounted for the defendant.

The statement of facts shows, that the notes stated in the plea of setoff or reconvention, were given to the United States Bank of Pennsylvania, in payment of *exchange*, bought of said defendant, and dishonored; the plaintiff being the agent of that bank in the transaction.

The payee and endorser of these two notes, deposed that he had no interest therein, but became the payee and endorser at the plaintiff's request; that at the time of the sale of the *exchange* by the defendant, the witness supposed that

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A party cannot recover back usurious interest or discount which he has voluntarily paid, either by a direct action or exception.

A plea in compensation and reconvention, setting up different matters, in no way connected with the plaintiff's demand, will be rejected.

the plaintiff was the purchaser; and it was not until after the dishonor of the bills, that the cashier of the plaintiff informed him, the bills of *exchange* were purchased by it as the agent of the Bank of the United States.

It was also proved that the note sued on was discounted by the plaintiff, to take up a bill of *exchange* taken for account of the United States Bank, different from, and subsequent to the exchange sold by the defendant, and for which the two notes on which usurious or excessive interest is alleged to have been taken, were given.

The inferior court did not err. The defendant sought to recover back usurious interest or discount, which he had voluntarily paid. This cannot be done by a direct action or exception. *Millaudon vs. Arnaud*, 4 *Louisiana Reports*, 542. If it could be recovered in this way, still, the plea in compensation and reconvention was properly rejected, for it is no way connected with the plaintiff's demand. *Code of Practice*, 375.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

HAGAN vs. CALDWELL ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The holder of a negotiable note endorsed in blank, who possesses it in good faith and gave for it a good consideration, cannot be affected by any failure of consideration between the parties to it and the original endorsee or holder.

This is an action against the maker and endorser of a promissory note, given for the price of a lot, and secured by mortgage on the premises.

The defendants deny generally and especially that John Hagan is the *bona fide* holder, he having received it after

protest, but that it was given to Richard Hagan, as vendor, in part payment of the price of a lot, which he purchased from John Slidell, in whose favor there existed a mortgage on said lot, to secure the sum of seven thousand five hundred dollars, which Richard Hagan bound himself to raise, but which he failed to do, and that the consideration had failed. They called their vendee in warranty to defend.

The plaintiff proved his right to hold and sue on the note, having paid and received it from the Merchants' Bank, where it was discounted, in consequence of his responsibility for the paper of Hagan, Niven & Co. From the evidence it appeared that the plaintiff took up this note in the regular course of business, which was negotiable in its form.

There was judgment for the plaintiff, and the defendant, Caldwell, appealed.

Jones, for the plaintiff.

Macready, for the defendant.

Simon, J., delivered the opinion of the court.

This suit is brought on a promissory note which, having been discounted in the Merchants' Bank, was taken up and paid by the plaintiff, after protest, in consequence of arrangements made with the bank in relation to the paper on which the names of Hagan, Niven & Co., appeared. Defendants admit their signatures, but plead that the consideration of the note has failed; they also allege, that the plaintiff is not the owner and holder of the note sued on, which in fact belongs to Richard Hagan, and was given in consideration of the price of a lot of ground on which there was a mortgage at the time of the sale, and which has been seized and sold, subsequently, at the suit of the mortgage creditor.

The defence set up, which goes to show a failure of consideration, would perhaps be successful, if the note really belonged to Richard Hagan; but as against the plaintiff, we think it is entirely unsupported by the evidence, and is, therefore, unavailable. He appears to be the holder of the

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HAGAN
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The holder of a negotiable note endorsed in blank, who possesses it in good faith, and gave for it a good consideration, cannot be affected by any failure of consideration between the parties to it, and the original endorsee or holder.

EASTERN DIST. note in good faith ; to have given a good consideration for it ;
May, 1840. and in our opinion, he is entitled to recover.

**BURTHE
 vs.
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 ET AL.**

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BURTHE vs. DONALDSON ET AL.

**APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
 NEW-ORLEANS.**

A draft, drawn payable at no particular time, may be considered at sight; and an acceptance payable four months, is contrary to its tenor, and will release the drawer.

Where a plasterer drew a draft on the owner, stating "it was for plastering done on his building," the acceptance was an admission that the drawer was entitled to a privilege under article 3216, No. 2 of the Louisiana Code, and which passed to the holder of the draft.

This is an action on a draft, against the drawer and acceptor on a promissory note, given as collateral security of the draft, signed by Charles Wilkinson, the payee of the draft, and one C. Watson, endorsed by F. Bryde. The tenor of the draft is as follows :

"New-Orleans, February 26, 1839.

"Mr. Barnes : Please pay Charles Wilkinson the sum of \$560, for plastering done on your building, and charge the same to my account. **JOHN DONALDSON.**"

Endorsed, "Charles Wilkinson."

Acceptance : "I accept the within order, payable four months after.

"New-Orleans, 27th February, 1839. **W. BARNES.**"

The plaintiff alleges, that he is subrogated to the rights of Donaldson, the drawer of the draft, and has a privilege,

also, on the building of Barnes "situated in St. Paul-street, between Common and Gravier streets. He prays judgment, *in solido* against all the parties to the note and draft, with privilege on the house, or its proceeds.

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Donaldson and Barnes pleaded a general denial. Judgment by default was made final against the other defendants. The note, draft and protest, with proof of the signatures, were produced in evidence, and there was judgment also against Donaldson and Barnes, *in solido*, for the amount of the draft, with costs of protest, and privilege on the proceeds of the sale of the house on which the plastering was done, and for which the draft was given. These defendants appealed.

Grivot, for the plaintiff, prayed the affirmance of the judgment, with damages, as for a frivolous appeal.

Collens, for the defendants, insisted that there was no evidence to show the existence of a privilege, as regards Barnes, on the house mentioned; and no such privilege, as that contended for, could exist.

2. There is error in the judgment as regards Donaldson. He was clearly discharged by the acceptance of the draft on time. This was contrary to its tenor, and giving time to the acceptor, which released the obligation as to the drawer. There was no demand made on the acceptor at maturity, or notice of the dishonor of the bill given in due time to Donaldson. He is discharged on these grounds.

Bullard, J., delivered the opinion of the court.

This is an action upon a protested draft, against the drawer and acceptor, and upon a promissory note given as collateral security. Judgment having been rendered against all the parties, two of them, to wit, Donaldson the drawer of the draft, and Barnes the acceptor, have appealed.

On the part of Donaldson, the drawer, it is urged that the judgment against him is erroneous, inasmuch as the draft drawn by him was not accepted according to its tenor, and

A draft drawn payable at no particular time, may be considered at sight; and an acceptance at four months, is contrary to its tenor, and will release the drawer.

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Where a plasterer drew a draft on the owner, stating "it was for plastering done on his building," the acceptance was an admission that the drawer was entitled to a privilege under article 3216, No. 2 of the Louisiana Code, and which passed to the holder of the draft.

that he has never been notified of a demand, and failure to pay, on the part of the acceptor.

We think the exception well taken. The draft was not at any particular sight, and may, therefore, be considered as at sight. The bearer consented to an acceptance at four months, and thereby, we think, released the drawer.

Barnes, the acceptor, complains that the judgment allows the plaintiff a privilege on a particular house.

The draft, which the defendant, Barnes, accepted, was drawn by a plasterer, and the consideration, expressed on the face of it, was "for plastering done on your building." The acceptance of the draft was an admission that the drawer was entitled to a privilege under article 3216, No. 2 of the Louisiana Code, upon a building of the acceptor. That privilege passed to the plaintiff, who was the bearer of the draft. But it is said the evidence does not show that the privilege existed on the house in St. Paul-street, between Gravier and Common streets. The appellant was notified by the petition, that a privilege was claimed on that particular building, as the one on which the plastering had been done. There is no evidence that the appellant owned any other house. As relates to him, it ought to be indifferent whether there be a privilege on one of his houses or another; and if that particular building has ceased to be his, the judgment cannot affect the present owner, not a party.

The judgment, so far as relates to the appellant, Donaldson, is therefore avoided and reversed, and ours is in his favor, with costs in both courts; and as it relates to the defendant, Barnes, the judgment is affirmed, with costs.

ALLING ET AL vs. BEAMIS.

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APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

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vs.

BEAMIS.

The purchaser of property previously mortgaged takes it, subject to the balance due on such mortgage, whatever it may be, and retains this sum in his hands over and above the price he bids, to be paid to the rightful owner.

The inferior court has no longer any power over an appeal, after it is once granted. The Supreme Court alone has jurisdiction over this case, when an appeal is once taken.

This is an action against the defendant as possessor of a lot of ground, purchased by him at public sale, and subject to a mortgage to secure the ultimate payment of two notes, given by H. Florance & Co., as part of the consideration of said lot, to French and Meux, for four hundred and eighty-one dollars each. The lot passed through several sales, into different hands, and among others the plaintiffs, and was finally sold under an order of seizure and sale at the suit of Beamis vs. Gloyd, one of the intermediate purchasers. Beamis purchased it in for less than his claim on Gloyd. While the plaintiffs held it, they took up and paid these two notes to French and Meux, for which the property was originally hypothecated, and became subrogated to their rights against it. They now demand judgment of Beamis for the amount of the notes, or that he surrender up said lot.

The defendant pleaded a general denial, and averred that he owns and possesses said lot free of any incumbrance whatever; having purchased it at sheriff's sale; and further, that the matters in this case have been adjudicated by the District Court, which he pleads as *res judicata*.

The facts of the case are more fully detailed in the opinion of the court which follows:

The judge presiding was of opinion the plaintiffs had not shown themselves entitled to recover, as being subrogated to the rights and mortgage of French and Meux, gave judgment for the defendant. The plaintiffs appealed.

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Hoffman, for the plaintiff. The sale and purchase of the property by Beamis, did not release the mortgage of French and Meux, which was duly recorded. He took the property subject to this mortgage, which existed as security for the payment of all the notes given for the price, by Florance & Co. The plaintiffs have as much right to go on the mortgage for the two notes they took up, as the defendant had to sell the mortgaged property for the three notes he had to pay, as endorser for Gloyd; for the latter assumed the two notes in question, as part of the price of his purchase. In fact, the property was sold, subject to this entire mortgage, and in pursuance of the *Code of Practice*, article 679; 6 *Martin, N. S.*, 615.

2. If French and Meux had come upon the property, for the amount of these two, there would have been no semblance of ground on which to resist their claim; and the plaintiffs, by taking up the notes, were subrogated to the rights of the mortgage creditors; the defendant purchased in the property subject to this mortgage, and must be considered as retaining the amount of these two notes in his hands, to be paid to the holder of them.

Maybin, for the defendant, insisted that the plaintiffs were not to be considered in the light of purchasers, for in the auction sale from Bergen to them, there was no act of sale ever passed. They paid the notes in bank, when they were not purchasers in reality, of this mortgaged property, and had no legal interest in paying these two notes; but their payment extinguished the debt and also the mortgage, its accessory; and that consequently, Beamis purchased the property free of mortgage.

2. The first objection to the plaintiff's recovery, is that no legal title was in Gloyd, till February 25, 1837; no *procès verbal* of the auctioneer, of a sale from Florance & Co., to Gloyd, is shown. The auction sales from Gloyd to Bergen, and from Bergen to the plaintiffs, were, therefore, made prior to any title in Gloyd; he, therefore, could give none.

3. But, supposing that Gloyd had title on January 25, and

February, 17, 1837, no act of sale was passed from him to Bergen, and none from Bergen to plaintiffs; this they admit in their petition. There was no title in them, and the plaintiffs were not purchasers. *Louisiana Code*, 2255, 2415, 2588.

4. The article 2586, makes the adjudication the completion of the sale. This means only between the parties, as is provided for in the article 2431, and is to be taken in connection with the 2255, 2415, and 2588th articles above quoted, being on the same subject. The act of sale is still indispensable; and there is no title, as regards third persons, without it.

5. Even if an act of sale was passed from Gloyd to Bergen, or from Bergen to the plaintiffs, it was not registered in the office of the recorder of conveyances. *Act of March 20, 1827, section 5*; and, therefore, it would not be good against the defendant. The plaintiffs, therefore, were not purchasers; and the 2157th article of the code, does not apply.

6. The plaintiffs have not been subrogated to the rights of Florance & Co., the vendors of Gloyd, because they were not bound *with* or *for* Florance & Co. *Code*, article 2157.

The law of implied subrogation relates only to obligations to which the payor, who becomes subrogated, was a party *with*, or *for* others, as endorsers, surety, or obligor *in solido*; that is, he must be a party to the obligation. For this reason an endorser of a note given for mortgaged property, when he pays it, becomes *ipso facto* subrogated to the mortgage of the mortgage creditor. Had the plaintiffs been the endorsers on the notes of Florance & Co., by their payment of them they would have become subrogated to the mortgage of Meux and French.

Two conditions are requisite: 1. That the debt be *common to him who pays*; 2. That the person paying have an interest in paying. 7 *Toullier*, section 148, page 195.

7. But the plaintiffs say that they assumed the payment of these two notes. Where is the proof? No act of sale was passed from Bergen to them, therefore, they did not assume the payment in that, and an act of sale is the *only* evidence of the obligations of a purchaser. There is no evidence of

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such an assumption. In the memorandum, page 8, the terms are not mentioned, and if they were, they were not signed by the plaintiffs. In the other memorandum, page 12, nothing is said by the auctioneer that the lot was sold to the plaintiffs on those terms, and even if he had, as the plaintiffs did not sign the memorandum, they gave no consent or assumption.

This is only one way to bind a purchaser of immoveable property, and to show his assumption or obligation. *Code, article 2255, 2415.*

To conclude : The plaintiffs were neither purchasers, nor bound *with or for* Florance & Co., and are, therefore, not subrogated to any mortgage, which was extinguished. Their recourse must be against Gloyd, for whom, and for whose benefit they paid the money.

Simon, J., delivered the opinion of the court.

This is an action of mortgage, instituted by the plaintiffs against the third possessor of a certain town lot. The record shows that on the 10th of June, 1836, French and Meux sold the lot to Florance & Co., who gave four notes of four hundred and eighty-one dollars and twenty-five cents each, in part payment of the price ; on the 25th of January, 1837, Florance & Co. sold the same lot at auction to one Gloyd, who on the same day sold the same by auction to Bergen ; and Bergen, on the 17th of February, sold again the same lot by auction to plaintiffs. No act of sale from Florance & Co. to Gloyd was passed until the 25th of February, and in the said act, Gloyd assumed the payment of two of the notes of Florance & Co. to French and Meux. It appears to have been understood between the successive vendors and purchasers, that the two outstanding notes due by Florance & Co. to French and Meux were to be assumed and paid by the last purchaser, but no act of sale was ever passed from Gloyd to Bergen, nor from Bergen to the plaintiffs. On the 5th of June, 1837, plaintiffs, in compliance with the conditions of the adjudication, paid the two notes in bank. In December, 1838, the defendant, who as endorser of the notes of Gloyd to Florance & Co., had been compelled to pay the last note

due on the 25th of July, 1838, to the amount of one thousand three hundred and eighty-four dollars and seventy-two cents, issued an order of seizure and sale against the lot, and purchased it at sheriff's sale to an amount not sufficient to secure himself; the certificate of mortgage found in the record shows that the lot must have been sold by the sheriff, subject to the payment of the two outstanding notes secured by mortgage; and this we are to presume, as the record does not contain any of the proceedings had on the order of seizure and sale by the sheriff, nor does it contain the sale from the sheriff to the defendant.

In this state of the case, it is contended by the plaintiffs that they are entitled to be reimbursed the amount by them paid to French and Meux; in discharge of the two notes secured by mortgage; having become subrogated to the rights of the vendors, and they pray that the lot in question be surrendered, in order that it may be sold to satisfy their demand as a mortgage claim. On the other hand, the defendant denies the plaintiffs' right of mortgage, and avers that having purchased the lot at sheriff's sale, he is the owner of it, without any mortgage or incumbrance of any kind.

We are not to examine into the title which the plaintiffs may have acquired to the lot in question, since they do not sue for the property; but it may be necessary to look into it so far as to ascertain the reason which induced them to take up the two notes due to French and Meux; from the evidence, it appears that they did so, in compliance with the terms of the sale, and in the belief that they were the rightful owners of the lot; and if so, they had a right to pay the mortgage creditors. Under the 2586th article of the Louisiana Code, the adjudication is the completion of the sale, and the purchaser becomes the owner of the object adjudged; from this moment, the plaintiffs had a right to claim the property as purchasers thereof; and as such, they had an interest in employing the price of their purchase in paying the creditors in favor of whom a prior mortgage existed on the lot. *Louisiana Code, article 2157, section 2.* The title of the plaintiffs

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The purchaser of property previously mortgaged takes it subject to the balance due on such mortgage, whatever it may be, and retains this sum in his hands, over and above the price he bids, to be paid to the rightful owner.

to the property in question, resulting from the adjudication, may have been destroyed by subsequent circumstances ; but it is nevertheless true, that at the time of the payment, nothing prevented them from considering themselves the owners of it, and from complying with the terms of what they had every reason to believe to be their contract. We think, therefore, that the plaintiffs, by paying the two notes due to French and Meux, have acquired a legal subrogation to the rights of the creditors, who had a mortgage prior to that under which the defendant purchased the lot at sheriff's sale.

But it is contended, that at the time of the sale to the defendant, there was no mortgage on the property, since the amount of the notes had previously been paid to the mortgage creditors. Whether this position be correct or not, the certificate of the recorder of mortgages shows that the mortgage given to secure the payment of the notes had never been released ; and if, as we have already said, we are bound to presume, until the contrary be shown, that the sheriff sold the property according to law ; Code of Practice, article 679 and 683, it results that the lot was sold, subject to the mortgage apparently existing, that the amount of the notes was a part of the price, and that the defendant retained, and has in his hands, the very money required to satisfy the debt for which he is now sued. This circumstance alone would be sufficient to entitle the plaintiffs to recover ; the defendant has certainly no right to keep the amount proceeding from the price of his adjudication, it must be paid over to somebody ; it cannot be paid to French and Meux, who have received it from the plaintiffs ; it does not belong to Florance & Co., who were the drawers of the notes ; Gloyd cannot set up any claim to it, since it was a debt which he had originally assumed to pay as part of the price of his purchase, and we see no reason why the defendant should be allowed to keep both the price and the property, and thereby to enrich himself at the prejudice of another. We think that the judge *a quo* erred in giving judgment in favor of the defendant ; and ours must be for the plaintiffs for the amount of the notes, with legal interest from judicial demand.

We have not thought necessary to notice the question of *res judicata*, raised by the defendant ; it is untenable ; but the proceedings which gave rise to it are so novel in their character, and so irregular in practice, that we cannot forbear expressing our astonishment that the judge, before whom they were had, could for a moment entertain the idea that, after having granted an appeal, he could legally, and on motion of the appellee, take cognizance of its propriety and of its merits ; and render a judgment, (here the basis of the plea of *res judicata*,) rescinding his former order, and dismissing the appeal. It is well settled that this court alone has jurisdiction of a case in which an appeal has been granted, and that no further proceedings can be had therein in the lower court, until the case has been disposed of by this tribunal, and its mandate returned below for execution.

It, is, therefore ordered, adjudged, and decreed, that the judgment of the Commercial Court be annulled, avoided and reversed ; and this court proceeding to give such judgment as ought to have been rendered in the lower court, it is ordered, adjudged and decreed, that the plaintiffs do recover of the defendant, the sum of nine hundred and sixty-two dollars and fifty cents, with legal interest per annum thereon, from the 6th of May, 1839, until paid, with costs in both courts ; and that the property described in the petition, be seized and sold to satisfy this judgment.

BANKS VS. HYDE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The owner cannot interpose another person to bid in his property for him at a resale, so as to charge the *folle enchère*, or first purchaser failing to comply with the terms of sale. He becomes himself the purchaser, and there is in fact no sale.

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The inferior court has no longer any power over an appeal after it is once granted. The Supreme Court alone has jurisdiction over the case, when an appeal is once taken.

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This is an action to recover the sum of twelve thousand dollars, as the difference between the first and second sales of property, first adjudicated to the defendant; and on his failing to comply with the terms, resold on his account, and at his risk. He bid nineteen thousand dollars at the first sale, and at the second, it was struck off to Joseph E. Whitall for seven thousand dollars.

The defendant pleaded a general denial, but admitted he bid for the property as alleged, and it was struck off to him; that if the contract of sale was not carried into effect, it was the fault of the plaintiff in not removing sundry mortgages, of greater amount than the value of the property. He denies the right of Banks to resell the premises, or claim from him the difference between the two sales.

Upon these pleadings and issues the cause was tried. The plaintiff offered evidence to show that he tendered the necessary act of sale, and required of the defendant to comply with its terms.

Whitall, to whom the property was struck off at the second sale, was called as a witness, and declared he was not present at the sale; that some one met him, soon after, and told him he had bought the property very cheap, and advised him to go and accept the sale, which he did; but states he subsequently conveyed the property to the plaintiff, without receiving any of the money or notes mentioned in the act as the price or consideration: in fact, Banks paid him no consideration.

There was other testimony adduced on the trial, not material to notice.

The district judge was, however, satisfied with the plaintiff's proof and right to recover. Judgment was rendered against the defendant for the sum claimed, and he appealed.

C. M. and F. B. Conrad, for the plaintiff, insisted that the defendant was duly and properly put in default, for having failed to comply with the terms of the first sale, and that he is bound for the deficiency in price. *Louisiana Code*, 1905-6-7, 2539; 3 *Louisiana Reports*, 384; 5 *idem.*, 375; 7 *idem.*, 506.

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Straubridge and *Lockett*, for the defendant, urged that the plaintiff was in fault in not disincumbering the property, as was required; and that there was no legal delivery.

2. The plaintiff sustained no damage, and has no right whatever to recover. The second sale was feigned and simulated, and does not authorize an action of damages for the difference in price.

Morphy, J., delivered the opinion of the court.

The defendant appeals from a judgment condemning him to pay twelve thousand dollars, the difference between the price at which certain property was adjudicated to him, and that which it brought on a resale at public auction, on his refusal to carry into effect the first adjudication.

The view we have taken of this case, makes it useless to examine the grounds on which the defendant has endeavored to justify his refusal to execute the sale.

From the evidence, it appears, that when the property was put up for sale the second time, it was adjudicated apparently to Joseph E. Whitall, but, in reality, to the plaintiff himself. The name of the former was given in to the auctioneer, as being the purchaser, without his knowledge or consent, and shortly afterwards the property was reconveyed to the latter. No consideration was given or received by Whitall, in either sale. He declares, explicitly, that he always thought he was holding the property for Banks, whose agent he was. The plaintiff must then be considered as having himself become purchaser at this second sale, *qui facit per alium, facit per se*. The owner of property cannot interpose another person to bid in his property for him at a resale, to charge the *folle enchère*, or first purchaser failing to comply with the terms of sale. He becomes himself the purchaser, and there is, in fact, no sale.

The first adjudication was for nineteen thousand dollars; the second for seven thousand dollars. We cannot consider

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the difference as a loss to plaintiff. If it was allowed him, he would be receiving his property back, and besides, a sum of twelve thousand dollars. A vendor must take his choice, either to regain possession of his property, or to insist on the payment of the price by bringing suit against the purchaser, or by resorting to the course authorized by article 2589 of the Louisiana Code. This article provides that the thing sold is to be again exposed for sale, as if the first adjudication had never been made. If, at this second exposure for sale, the vendor buys in the property, he must be considered as withdrawing it, or renouncing the right of reselling, for the account and risk of the first purchaser. He can claim of the latter, no deficiency of the price when there has been no resale. The plaintiff could no more buy at this second sale, than he could at the first. *Louisiana Code*, article 2418; See the recently decided case of *Municipality No. 2 vs. Hennen*, 14 *Louisiana Reports*, 559.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant, with costs.

BALDWIN'S EXECUTOR VS. CARLETON.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An executor cannot be a purchaser of the property of the estate he administers, when sold at public auction by order of the Court of Probates. He cannot be buyer and seller.

The court should not receive evidence of the *value* of professional services, as of an attorney at law, but pass upon them as an expert; the services being rendered under the eye of the court.

An executor who is a professional man, and renders legal services to the estate administered by him, is not entitled to any separate compensation, according to the practice in England.

When an executor receives money of the estate from a co-executor, or applies it improperly to his own use, it is considered still as money in his hands as executor, for which he is accountable, and it may be recovered in the Court of Probates.

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This is an action by way of opposition filed by Thomas H. Maddox, testamentary executor of Eliza Baldwin, deceased, and tutor of her minor son, to an item of seven thousand five hundred dollars, charged in the account of Henry Carleton, his co-executor, for professional services as attorney and counsellor at law, rendered the estate administered by them. He further alleges, that he was induced to allow said charge, supposing it to be correct, but has since understood that his co-executor is not entitled to any separate compensation over and above his commissions, and that he allowed it in error, which was caused by the interested misrepresentation of said Carleton. He prays that their account as executors be amended, this charge disallowed, and that the said Henry Carleton be condemned to return this sum of money to the mass of the estate, and pay it over to him as tutor of the minor, Isaac Baldwin.

The defendant opposed a general denial.

It was admitted that Carleton received his full share of the commissions, as co-executor of Mrs. Baldwin's estate, amounting to seven thousand one hundred and eighty-seven dollars; and it appeared that there was very little legal or professional service required or rendered. Testimony was taken as to the value of the services rendered. Several members of the bar gave it as their opinion, from the magnitude and amount of the estate administered, the services charged by the defendant were not too high.

The Judge of Probates reduced this charge, or item, to three thousand dollars, and ordered the tableau, or executor's account, to be amended accordingly. Both parties appealed.

L. Janin, for the plaintiff in opposition, contended that the judgment should be reversed, and one given disallowing

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the whole charge. An executor who is a lawyer, and renders legal services to the estate, is not entitled to a separate compensation. 1 *Chitty's General Practice*, 558; 2 *idem.*, Appendix, 109.

2. Professional services rendered in the settlement of an estate, must be estimated by the Court of Probates, from its own knowledge in case of contestation, without requiring testimony of the value of the services. 5 *Martin, N. S.*, 399; 3 *Martin*, 365, 606; 5 *idem.*, 416; 5 *Louisiana Reports*, 48; 9 *idem.*, 284; 12 *idem.*, 77.

3. The executor is bound to render all the services in his power to the estate, without charging more than the commission allowed by law. It is in evidence that the defendant, from his avocation and the place of his residence, could render, and did render to the estate, no other services but those which consisted in conducting the usual proceedings in the Probate Court; and it must, therefore, be supposed that he was appointed executor by the testatrix, because she expected those services from him.

4. If any fee could be allowed, that which has been allowed, should be reduced, for it is exorbitant. These services consisted in matters which required neither peculiar legal skill, or involved any responsibility, and cannot have occupied the defendant more than a few hours.

5. The exception to the jurisdiction of the Court of Probates, cannot be sustained. This suit is in the nature of an opposition to an executor's account, and which must be settled in the Court of Probates. The court, if it disallows the charge, or this item in the account, must have the account amended, the charge stricken out, and order this amount of the money of the estate to be paid over by the co-executor, to the tutor and representative of the heir.

Micon and Lockett, for the defendant.

This case must be considered, either as a suit to recover back money paid to the defendant, or as an opposition to a tableau of distribution. As a demand for money paid, the Court of Probates had no jurisdiction. *Code of Practice*, 925.

As an opposition it must be dismissed, because there are no parties, and consequently no suit before the court.

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2. But if these exceptions are overruled, the defendant contends on the merits: That the defendant, although executor, was not bound to devote his *professional* services, without compensation; that the evidence fully supports the reasonableness of his demand; that whether the defendant was or was not, in *strict law*, entitled to his fees, he is entitled to them in equity and good conscience; and in such case, no action lies to recover money paid, because the law presumes the payment to be made, in fulfilment of a natural or moral obligation. See cases cited, *Evans' Pothier*, vol. 2, 379, 389, 390; *Louisiana Code*, 1840.

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3. The payment is not alleged or proved to have been made under any error or mistake of fact.

That the payment was made in pursuance of a tableau filed by plaintiff, which is a judicial act or confession; and plaintiff cannot revoke it, under pretence of an error in law. *Louisiana Code*, 1840, 2270.

Martin, J., delivered the opinion of the court.

The executors of the estate of Eliza Baldwin, deceased, having presented their account for homologation, one of them, Thomas H. Maddox, who is also tutor to the heir of the testatrix, opposed an item in the account, in which a charge is made of the sum of seven thousand five hundred dollars, as a fee for professional services rendered by Henry Carleton, Esq., his co-executor. This fee was reduced by the judgment of the Court of Probates, and both parties appealed.

The grounds of opposition are, that this charge was allowed and paid, by the opponent, in error, and through the misrepresentation of his co-executor, who assured him that it was legal and just. That he has since been undeceived, and is informed and believes that an executor can have no claim against the estate, for professional services.

The latter part of this opposition presents the only question which we are called upon to solve.

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An executor cannot be a purchaser of the property of the estate he administers, when sold at public auction, by order of the Court of Probates. He cannot be buyer and seller.

prohibited from purchasing property of the estate which he administers. He cannot be buyer and seller. The law will not permit him to put himself in a situation in which his duty and interest must necessarily be at variance. In such a sale, it is his duty so to act that the property sold should bring the highest price. His interest is to have it sold for the lowest. The law, therefore, strikes the sale with nullity. The reason is the same if the executor sells to the estate a part of his own property, as supplies necessary to the use of the plantation belonging to the estate. In such a case his interest and his duty are equally in opposition. It is his duty so to act that the supplies may be furnished to the estate on the lowest terms. It is his interest that they should be sold at the highest price. There can, therefore, be no difference between the purchase by an executor, of cotton belonging to an estate administered by him, and the sale of the necessary supplies, which is his property, for the use of the estate.

In vain would it be said that the law would not strike with nullity the sale of cotton, if the highest price was given, or that of the supplies, if the lowest was taken: for the Code says, "when, to prevent frauds, the law declares certain acts void, its provisions are not to be dispensed with, on the ground that the particular act in question has been proved not to be fraudulent or contrary to the public good." *Louisiana Code*, article 19. The prohibition as to the contract of sale extends to that of lease; indeed, to every other species of contract: for no executor or any other person can contract with himself. *Beall vs. M^cKernion*, 6 *Louisiana Reports*, 437. If he could, his interest would be at variance with his duty.

In the present case, it was the interest of the estate, that the best attorney should be selected and employed on the best terms. It was the duty of the executor to employ such. But it was his interest in this case that he should be employed at all events; and as his conduct has shown, on the very highest terms. In our opinion he succumbed to the temptation. The charge was reduced by the judge of probates,

below one-half; and we think that if another attorney than the executor himself had been employed, his services would have been well rewarded by one-third of what was allowed.

It was admitted in argument, that there was not a single suit brought for or against the estate. It moreover appears, that all the professional services rendered, were confined to obtaining the ordinary orders of court, for the probate of the will; appointing appraisers and taking the inventory, for the sale of the personal property in this city, which consisted chiefly of the furniture of the house in which the testatrix died; and finally, presenting a petition for the homologation of the executor's account.

The court ought not to receive testimony of the value of professional services like those. It should pass upon them as an expert. As the services to be thus compensated are rendered under the eye of the court, it should fix the value of them on its own responsibility. We so held in the case of *Dorsey vs. His Creditors*, 5 *Martin, N. S.*, 399.

In England, it has been held that an executor, who is also a professional man, and renders legal services to the estate he administers, is not entitled to any separate compensation. 1 *Chitty's General Practice*, 553. 2 *idem.*, *Appendix*, 109.

The defendant's counsel contended that the Probate Court was without jurisdiction in this case; it being an attempt to recover money from him in his individual capacity. We think there is nothing in the objection. When an executor receives money of the estate from his co-executor, or applies it improperly to his own use, it is in contemplation of law still money of the estate in his hands, as executor, and he is accountable in the Court of Probates therefor, in the same manner as if it had never been so applied.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled, avoided and reversed; and proceeding to give such judgment as should have been rendered in the court below, it is ordered and decreed, that the account or tableau of the executors be amended, by striking therefrom the item or charge of seven

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An executor who is a professional man, and renders legal services to the estate administered by him is not entitled to any separate compensation, according to the practice in England.

When an executor receives money of the estate from a co-executor, or applies it improperly to his own use, it is considered still as money in his hands as executor, for which he is accountable, and may be recovered in the Court of Probates.

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thousand five hundred dollars, charged and paid to Henry Carleton, Esq., as a fee for professional services; that the tableau or account of the executors, thus amended, be homologated and confirmed; and that Thomas H. Maddox, tutor to the minor, Isaac Baldwin, heir of the testatrix, do recover of the said Henry Carleton, the sum of seven thousand five hundred dollars, with the costs of this opposition in both courts.

GRAVIER'S CURATOR VS. LARTET ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a third person purchases in property under an agreement to reconvey it, when funds are placed in his hands to reimburse the price and release him from his liability, the original owner or his representatives cannot claim any right to the property when the reimbursement has not been made or tendered.

This is an action by the curator of the vacant estate of the late John Gravier, to recover two lots of ground in New-Orleans, which had been seized under execution as the property of Gravier, and sold at sheriff's sale, and purchased in by the late Pierre Lique, for one thousand and thirty dollars, in November, 1823, who gave his twelve months bond; and entered into a written agreement with Gravier to reconvey him the property, on being reimbursed and secured for the price he had bid. This agreement, together with a mortgage given by Gravier to secure the payment of the twelve months bond, were duly recorded. At the end of twelve months, Gravier having failed to pay or provide funds, the property was again seized under the twelve months bond, and Lique purchased it for one hundred and fifteen dollars.

Liquet having since died, his heirs sued Gravier for the balance due on the first purchase of one thousand and thirty dollars, over and above the one hundred and fifteen dollars, for which the property was sold at the last sale, which suit is alleged to be still pending. The property has now passed into the hands of Matthieu Lartet and wife, and H. C. Gildemeester.

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The plaintiff alleges that these lots were, and always remained the property of Gravier, who, although he did not immediately refund the sum originally bid, agreed to pay interest, and did actually pay on account of principal and interest, eight hundred dollars. That the defendants refused to give up said property, although amicably requested, wherefore he prays judgment, declaring said lots to be the property of Gravier's estate, and that he be put in possession thereof.

The defendants made defence ; pleaded the general issue, and denied specially that the plaintiff had right or title to the property claimed ; also set out their titles, and called in their warrantors respectively. The whole case turned on the plaintiff's right to recover. There was no evidence to show that Gravier had paid or even tendered the price which Liquet had paid in virtue of the sheriff's sale to him.

There was judgment for the defendants, and the plaintiff appealed.

L. Janin, for the plaintiff, insisted that Gravier never ceased to be the owner of the property. The act under private signature between Gravier and Liquet gave to the former a perfect title as it was duly recorded.

2. Gravier has never been divested of title. If the money or price of the property at sheriff's sale has not been refunded, Liquet has his mortgage on another square of ground, and should have resorted to that. He expressly contracted with Gravier to reconvey the property, on being secured the amount of his purchase at sheriff's sale.

Benjamin, for the defendants.

1. If the private agreement between Liquet and Gravier be put on the most favorable footing for the latter, i. e. as an

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agreement that the title should remain in Liquet with an unlimited right of redemption in Gravier, plaintiffs cannot recover. This agreement was made under the old code, and at page 362, articles 91 and *seq.* of that code, the term for redemption is limited to ten years, under any circumstances. No proof was made in this case that the money was paid within ten years, Louisiana Code, 2545 and *seq.*

2. But by the very terms of the private agreement, Gravier was to get title from Liquet, *only in the event of his furnishing the amount of the bond six days before maturity.* This is not even alleged by plaintiff. This condition not being complied with, he has no title on the very face of his own pleadings.

3. The original plaintiffs in execution against Gravier took out, on the non-payment of the twelve months bond, an execution against the parties to it. On this execution, they seized, as they had the right to do, the lots in question. Any individual had a right to purchase on this execution, and if a third person had purchased, there would have been no shadow of ground for questioning the title, because the plaintiffs in execution were not bound by any private agreements between Liquet and Gravier. But there is nothing in that agreement, in law or in reason, to prevent Liquet's buying the property, if seized in his hands, by reason of Gravier's failure to perform his agreement, which disability is not shown, and cannot be presumed.

Eustis and M'Millen, for the warrantors, contended :

1. The title was in the purchaser at sheriff's sale, Liquet, by the adjudication and sheriff's deed.

2. It was confirmed in him by the second adjudication, at the expiration of the twelve months bond.

3. It was possessed and held from the time of the adjudication, by Liquet and his heirs and their vendors, *with the consent of Gravier.* This is to be inferred from the plaintiff's own petition, the sheriff's deed, and the subsequent sales.

4. The principles established by this court in the case of *Dorzer vs. Squires*, 13 *La. Reports*, 130, will protect the third purchaser in a case like this. If Gravier put his property in

the names of other persons, and it was sold under execution as their property, equity will protect a *bona fide* purchaser, without notice.

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5. The defendants rely on the prescription of ten years.

6. It does not appear that the lot purchased by the defendant in warranty, is the same as that described in the private writing referred to in the plaintiff's petition. The plaintiff, then, showing no title, judgment must be for the defendant.

7. The private agreement between Liquet and Gravier, bound Liquet to convey the property to Gravier, on Gravier's compliance *with a condition*. The compliance with the condition, within the time specified, was a pre-requisite to the exercise of any real rights in relation to the property.

8. The non-compliance of Gravier with the condition, necessarily excludes any right to the property on the part of Gravier.

9. It is only in alleging a compliance with this condition, that Gravier could maintain an action even against Liquet. This not having been done, the suit against a *bona fide* third purchaser, must fail.

Martin, J., delivered the opinion of the court.

The plaintiff seeks to recover two lots, which were sold on an execution against Gravier, and purchased at his request, by one Pierre Liquet, who gave his bond therefor, at twelve months. Gravier promised to place the price in his hands a few days before the maturity of the bond, giving, also, a mortgage for the further security of Liquet; who, according to an act *sous seing privé*, subscribed by Gravier, and recorded by Liquet, was to reconvey the lots, on being released from his liability for the price. Gravier having failed to place funds in his hands, the lots were sold, and purchased by Liquet, who, besides the consideration of this sale, paid the balance which remained due on the bond. These lots afterwards, by different conveyances, passed to the defendants.

Were the lots in question still in the hands of Liquet, a reconveyance could not be claimed from him, according to his contract with Gravier, until after the dissolution of his

Where a third person purchases in property under an agreement to reconvey it, when funds are placed in his hands to reimburse the price, and release him from his liability, the original owner or his representatives cannot claim any right to the property when the reimbursement has not been made or tendered.

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liability, or the reimbursement of what he had paid to obtain it. This reimbursement has never been made or tendered; the vendees of Liquez cannot, therefore, be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

PONTCHARTRAIN RAIL-ROAD CO. VS. ORLEANS NAVIGATION CO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The Pontchartrain Rail-road Company have the *exclusive* right and privilege, for twenty-five years, from 1830, of *constructing and using* a rail-road from the city of New-Orleans to lake Pontchartrain.

The legislature possesses the power of granting exclusive rights and privileges as the reward for constructing rail-roads, in the same manner as congress may reward the discoverer of a new invention.

This case commenced by injunction. The Orleans Navigation Company and H. J. Ranney, Esq., were availing themselves of a provision in the charter of said company, to construct a rail-road, or two connected rail-roads, from a point in the city of New-Orleans to lake Pontchartrain, which, the plaintiff's allege, is in violation of their *exclusive* privilege and right to make and use a rail-road from the city to the lake. The provision in their charter, under which the defendants were proceeding, is as follows :

"SEC. 13. The president and directors may *lay out and construct*, from the bayou-bridge at the bayou settlement, a *highway or road*, on each side of the said bayou ; and if such road or roads shall be constructed of shells, sands or other hard materials, and shall be at least of the breadth of twenty feet, and fit at all seasons for the passage of every kind of wheel carriage, and shall be so certified, &c., said

president and directors may erect a toll gate on each of such roads, &c." See *Territorial act of July 3d, 1805, section 13*; 2 *Moreau's Digest*, 88.

The authority under which the plaintiffs deny the right of the defendants to proceed in the manner they were doing, is contained in the 5th section of the act incorporating the Pontchartrain Rail-road Company, passed the 20th January, 1830, which says "said incorporation is invested with all the rights and powers necessary for the construction and repair of a rail-road from the city of New-Orleans to some suitable point on lake Pontchartrain, &c." "And it is stipulated and agreed that for, and during the space of twenty-five years from the passage of this act, said corporation shall have the exclusive right and privilege of constructing and using a rail-road or rail-way, leading to and from the city of New-Orleans, &c., to and from Lake Pontchartrain; and that, during that period, no other body corporate, person or persons, shall make any similar road for the transportation of passengers or property, between said city, &c., and the incorporate limits thereof and said lake; or be invested with any similar privileges. And it shall and may be lawful for the said corporation to continue and extend said rail-road to any point within the city of New-Orleans, with the like rights and privileges, &c." (See *Session Acts of 1830, page 2, section 5.*)

These two clauses of the respective charters of the two companies, makes up the issue, and form the basis of this contestation. There are some bills of exception, which are not material to the decision of the case in this court. The facts of the case are fully stated in the opinion below.

There was judgment perpetuating the injunction, and the defendants appealed.

Eustis and Hoa, for the plaintiffs.

The appellees will contend, on the appeal:

1. That the charter of the plaintiffs is a lawful contract with the state, which has been complied with on the part of the plaintiffs, and which must be kept on the part of the state.

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2. That the acts set up in the answer of the defendants, are not authorized by their charter.

3. That there is no error in the judgment of the court below, and the same ought to be confirmed.

Mazureau, for the defendants and appellants, contended that the only questions involved, were:

1st. Had the Navigation Company the right to construct the kind of road which they have been enjoined from constructing?

2d. Was the privilege on which the Pontchartrain Rail-road Company obtained their injunction, valid and lawful?

It is here contended, that by their charter, the Navigation Company had a right to make on either side of bayou St. John, from the bridge settlement down to the lake, any kind of road or highway whatever, and of any kind or mode, whether then known in this country or not, at that period; and that, as it respects particular kinds of roads, or mode of making roads, then unknown here, and since discovered or invented, none but the inventors or discoverers thereof, having obtained a patent therefor, could legally oppose the Navigation Company, or prevent them from constructing it.

The clause in the charter of the Navigation Company is, on this subject, as full and general as possible; it admits of no exception or restriction whatever. The Company may construct and lay out, on each side of the bayou, a highway or road, constructed of shells, sands, or other hard materials. In the presence of such a clause, can it be pretended that, if at that period it had pleased the company to construct on either side of the bayou what we call a rail-road, already known, and many years before, in Europe, it would not have been justified in doing so under its charter; or that any body would have been right in contesting the faculty of exacting from passengers the terms fixed by the said clause?

It is here confidently asserted, that as soon as a new discovery or invention has been made in any other country than the United States, any man, any body, individual or corporate, may use the same in the state of Louisiana; and that

no body or power whatever, not even the discoverer or inventor with his patent or brevet, obtained in Europe or in any other part of the civilized world, except the United States, would in any manner feel authorized to interfere and prevent the use of the new discovery or invention.

If this position be correct, (and it is believed that it cannot be contested that it is) the Navigation Company, who by their charter were authorized to construct a highway, or road of any hard material, had, most undoubtedly, the right to make a rail-road, without asking any body's permission.

2. Neither congress or the legislature have the power to give the exclusive privilege of the construction and use of a rail-road, as a reward for those who employ their industry in doubtful, but useful enterprizes, and in the same manner as congress can reward the discoverer of a new invention. And first, let us read the constitution of the United States on this subject. It says: "Congress shall have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." We find here, nothing of a *reward*. We find an encouragement to science and useful arts, no doubt; we find, also, protection to inventors and discoverers; but that is all, and that is enough. It is just and proper, it is equitable, that a person who has made a new discovery or invention, be protected in the enjoyment of all the advantages that can be derived therefrom. The discovery, the invention is his property, his most sacred property. Let him, therefore, be exclusively benefited by it, as far as it is consistent with the interest and prosperity of the country. But to *reward* him for it is more than was, or could be contemplated by the framers of the constitution; unless the sense of the word *reward* is restricted to the meaning, the plain meaning, of the words used by the constitution: "To secure for limited times, to the authors and inventors, the exclusive right to their respective writings and discoveries."

Could congress, if any but the author or discoverer of a new invention should apply for a patent or an exclusive

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privilege to use the new invention; could they, it is asked, grant him that privilege? It is not only doubted, it is denied; unless, perhaps, the applicant had the right transferred on him, to the invention, by the author or discoverer.

But surely, if the gentlemen who have solicited and obtained their charter of the Pontchartrain Rail-road Company, had applied to Congress, or to the patent office, for a similar privilege to the one they have got from our legislature, and upon such grounds as those described in the preamble of said charter, they would not have been listened to.

3. It may, it is believed, be confidently asserted, that, with but very few exceptions, great and new enterprizes are doubtful. We see, in the present age particularly, adventurers and speculators, the wildest in the world, embark in enterprizes of every kind. To their doing so, there can, perhaps, be no well founded objections in a government like ours; but reason seems to tell us that, if they are willing to undertake to carry into effect any of their wild schemes or projects, they ought not to be encouraged, countenanced or rewarded by the legislature. Let them do it at their own peril; let them, if they succeed, enjoy the benefit of it. Are they discoverers or inventors? let them be secured in their right of authorship. Are they not? take care, if you can, that poor, ignorant, weak or credulous persons, be not the dupes or victims of their ambitious and wild schemes.

But, the public may be benefited by it; the enterprize may prove to be of great utility to the public. God knows! But to this there is a most satisfactory answer: any man is at liberty to speculate or embark in doubtful enterprizes; but all he can claim is, that he be not interfered with, or prevented from going on, unless his projects are contrary to law or good morals.

Suppose a shoemaker, after having jointly with several others, "devoted much time and labor, and expended considerable sums of money, in ascertaining the practicability of erecting a grand manufactory of shoes and boots, by means of which they would be enabled to sell boots and shoes twenty five per cent. cheaper than boots and shoes are generally

and usually sold for;" can any person imagine that the legislature would be justifiable in granting them the exclusive privilege of establishing that grand manufactory, and of selling their boots and shoes at that price? Yet it would be of great utility, nay, of great benefit to the public, to the people. No such privilege would, most assuredly, be granted, unless the applicants were the authors, inventors or discoverers, of a new manner or mode of making shoes and boots; and in the right of using that new manner or mode, they would certainly be entitled to be secured, but in nothing else.

Now let us examine the privilege granted to the Pontchartrain Rail-road Company.

4. It is firmly believed that in these matters the truest and soundest principle is that privileges ought always to be strictly construed. If so, can it be said that the privilege goes to prevent any person from constructing and using a rail-road *from* any point in the limits of the city *to* any other point nearer than the lake? No. The exclusive privilege is *to* and *from* the city; *to* and *from* the lake; to that it is fixed, to that it is limited, to that it is restrained. It is not a privilege to go *from* the city *to* any intermediate point, or to come *from* the lake *to* any such intermediate point. The rail-road must be one entire and continued uninterrupted road from one point to the other, from the city to the lake.

Therefore, any man has a right to construct a similar road, that will not go from one to the other of said points. To say the contrary, would at once deprive our citizens of the right and faculty, which they certainly have, of connecting their own plantations or establishments with the city or any part of its suburbs, or incorporated limits by means of rail-roads; and it is here confidently asserted that it cannot be done, unless it be first admitted that our citizens are to be governed, not as free white people, but as slaves, who have no rights, or whose rights can be disposed of without their will, advice or consent.

5. Then it is contended, with an uncommon degree of confidence, founded upon an undoubted knowledge of the free institutions by which we are governed, and of the

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undoubted disposition of our supreme judiciary power, to protect all the members of this community in the full enjoyment of the rights which those fundamental institutions have been created to secure to them; that the defendants had a right to do what they were doing, when stopped and prevented by the injunction from the District Court.

To decide otherwise, is to say: 1st. That the charter of the Navigation Company, twenty-five years older than that of the Pontchartrain rail-road, which most undoubtedly gave them the right and power of constructing on both sides of the bayou, a highway or road, of any kind, shape or form, provided it was of hard materials, could be violated and trampled under foot by a subsequent charter, law or contract. 2d. That that charter can be strictly, rigidly and severely construed, and the meaning of it restricted to the sole meaning which the words used in it might have at the time, in the opinion of persons not acquainted with the existence of rail-roads in Europe, whilst the charter of the Pontchartrain rail-road is liberally construed, and the privilege it contains extended beyond the plain *letter* thereof. 3d. That our constitution is inconsistent, or may be inconsistent with the constitution of the United States; which cannot be said.

6. The defendants are well aware that the constitution of the state says nothing respecting patents or privileges to encourage science or useful arts. But they do sincerely believe, that when the law of congress, by which the people of the then territory of Orleans have been enabled to form a constitution and state government, was passed, which contained a positive provision that our constitution shall be *republican*, and *consistent* with the constitution of the United States, it could not be intended that our constitution, which is our own private social compact, would vest our legislature, with any power, expressed or implied, that would be inconsistent with the constitution of the United States. The provision in this instrument does certainly vest congress, and congress alone, with power to encourage new discoveries and inventions, and to secure to their authors, their respective rights to their said discoveries. This power, the several states have, there-

fore, divested themselves of, and none of them can exercise it, except perhaps within their own limits. But, surely, to go beyond that which was clearly intended and expressed in this federal compact, is far from being consistent with it. To say that men who have employed their capital and industry, or time, in ascertaining the possibility of connecting, by a rail-road, the city of New-Orleans with the lake, which possibility was ascertained twenty-five or thirty years before and which connection or connexity already existed by natural means of navigation, shall have the exclusive privilege of making a rail-road from one of these two points to the other, is far from being republican; it rather savors of despotic government. It is an injustice done to all the free citizens of the country; it is a monopoly granted without any merit on the part of the grantee. It is inconsistent with the constitution of the United States, made, as the sovereign people in convention said, to establish justice; it is even contrary to the spirit and intent of our own constitution, which was "*ordained and established to secure to all the citizens the enjoyment of the right of life, liberty and property.*"

Certainly, my right of liberty and property is abridged, when I am deprived of the faculty of making or using, without paying, an invention or discovery made in Europe, and for which no patent or privilege has been given by competent authority for the same, in these United States, to its discoverer or inventor.

Martin, J., delivered the opinion of the court.

The plaintiffs complained that the Orleans Navigation Company and H. J. Ranney, Esq., were violating their privileges and rights granted to them by the legislature, in attempting to construct a rail-road from the corner of Franklin and Toulouse streets, in New-Orleans, to lake Pontchartrain: and on showing that said defendants had already begun to construct said rail-road, at or near the Basin Carondelet, the plaintiffs obtained an injunction, restraining and prohibiting the defendants from proceeding any further with said work.

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The defendants severed in their answers. The Orleans Navigation Company denied that the plaintiffs had the exclusive right and privilege to construct and use a rail-road from the city of New-Orleans to lake Pontchartrain, as they claim; and which right and privilege they could only claim as inventors, having a patent therefor. They expressly aver, that they were commencing, and still intend to construct, from the Metairie road, or the Bayou settlement, to lake Pontchartrain, a rail-road for their own use and exclusive benefit, which they are authorized to do by their charter; that the right of constructing and using a rail-road, or any other road made of hard materials, has been expressly granted to them by the act of the legislative assembly of the territory of Orleans, approved July 3d, 1805.

The defendant, H. J. Ranney, pleaded a general denial, and admitted that he was constructing a rail-road from the corner of Toulouse and Franklin streets, along the canal Carondelet to the Metairie road, and that he in no way interferes with the rights and privileges claimed by the plaintiffs; and he positively denies all the rights and privileges claimed by the plaintiffs. The defendants pray for the dissolution of the injunction, with damages.

The cause was submitted to a jury, under a charge from the court, who returned a verdict for the plaintiffs. From judgment perpetuating the injunction, the Orleans Navigation Company appealed.

The counsel for the appellants, at the close of the evidence offered by them, filed a *renunciation* of any right on the part of the Orleans Navigation Company, to construct a rail-road from the settlements at the bayou bridge, on the bayou St. John, to lake Pontchartrain; and limited itself to the right to make a rail-road from the bayou bridge, along the bayou St. John, to a harbor to be constructed in said bayou St. John, at a point short of the mouth thereof, in such manner that said rail-road shall not touch at any point on the lake, but terminate at a point before coming to it. The filing of the renunciation was objected to by the plaintiff's counsel, and admitted by the court.

It is not contended that the plaintiff's charter does not grant to them "the *exclusive* right and privilege of constructing and using a rail-road leading from the city of New-Orleans to lake Pontchartrain, during the space of twenty-five years from its date; and that during that period no other body corporate or persons, shall make any similar road for the transportation of passengers or property, between the city and the lake." (See *Session Acts of 1830, section 5, page 4.*) It is, however, urged, that this charter violates the prior rights of the appellants under theirs, which authorizes them to "lay out and construct, from the bridge at the bayou settlement, a highway, or road, on each side of the bayou, to the lake." This did not authorize them to violate the rights of the patentees, who had obtained the exclusive privilege of employing particular materials in the construction of roads; nor the rights of any individual or corporation who had obtained the exclusive privilege of making a particular kind of road; especially such a species of road as was unknown at the time the appellant's charter was granted. In the same manner as congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprizes, for the construction of a rail-way between two points, which may be of great utility to the public, though the success of the enterprize may be precarious.

The renunciation of the appellants, proposing to change the point of termination of their road, towards the lake, was properly disregarded, as there can be no material difference between carrying the road to the lake, or to an indefinite point or distance therefrom.

There is a bill of exceptions taken by the counsel for, the defendants, to the refusal of the judge to charge the jury, as asked for by them. We have examined the points on which the court was required to instruct the jury, and are of opinion they do not require any particular notice from us.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The Pontchartrain Rail Road Company have the *exclusive* right and privilege for twenty-five years, from 1830, of constructing and using a rail-road from the city of New-Orleans to lake Pontchartrain.

The legislature possesses the power of granting exclusive rights and privileges, as the reward for constructing rail-roads, in the same manner as congress may reward the discoverer of a new invention.

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ARMINGTON'S EXECUTOR *vs.* GAS LIGHT AND BANKING CO.

ARMINGTON'S
EXECUTOR
vs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a bank receives a bill of exchange for collection, and fails to demand payment of the acceptor or maker, and not using the ordinary diligence to secure the liability of the parties to it, they make it their own, and become liable to the owner for the amount.

This is an action against the Gas Bank, to render it liable for failing and neglecting to have a certain bill of exchange, deposited with them for collection, presented to the acceptor for payment at maturity, and in not giving the proper or necessary notice to secure the liability of the parties to it. It appears that one William Cowell, on the 10th December, 1836, drew his bill for five hundred dollars, in favor of Harper, Carpenter & Co., on A. Tunstall, at Grand Gulf in Mississippi, payable four months after date. It had been accepted, and was deposited with the defendants, on the 21st March, 1837, for collection, and forwarded the next day, by mail, to the bank at Grand Gulf. A letter was received by the defendants from their correspondent at Grand Gulf, the 31st March, in which it did not appear that their letter, enclosing the draft or bill, had been received. On the 21st May following, another letter was received, informing the defendants that he was apprehensive that some letters of theirs had miscarried. In June, the defendants forwarded the second of exchange, and on the 28th, it was presented to the acceptor, and protested for non-payment; the draft having become due the 13th April, previously. It was admitted that the first of exchange was lost, in its transmission by mail, though regularly deposited in the post-office. It was also admitted, the agent of the owner of the bill (who deposited it for collection) called frequently on the defendants, between the maturity of the bill and the 28th June, to ascertain if the money had been paid; and it was also conceded, that the acceptor stopped payment, and became insolvent, between the 13th April, the maturity of

the bill, and the 28th June, when the second of exchange was presented for payment. The bill was received by the defendants for collection, in the ordinary course of business.

The defendants denied their liability, and averred that they used all due and proper diligence to have the draft collected.

Upon these facts and issues, there was judgment for the plaintiff, and the defendants appealed.

C. A. Jones, for the plaintiff, contended, that the defendants had made themselves liable, for their gross negligence, in not having the bill duly presented and protested, in order to secure payment from the parties to it.

Sterret, contra.

Simon, J., delivered the opinion of the court.

This is an action instituted against the New-Orleans Gas Light and Banking Company, to recover from this corporation, the amount of a bill of exchange deposited for collection by plaintiff's agent. It is alleged in the petition, that the defendants failed to demand payment of the bill, did not use the ordinary diligence to obtain the money from the acceptor or maker of the bill, or to secure their liability; and did not even give to the other parties such notice as might have given them an opportunity to obtain security from those to whom they were entitled to look for payment.

It is admitted in the statement of facts, that the bill was received by defendants for collection, in the ordinary course of business, and without any other contract for diligence or liability than what originates from, and is governed by the "*Law Merchant*." There was judgment in the District Court in favor of the plaintiff, and the defendants appealed.

From the facts of the case, it appears to us that the district judge decided correctly in making the defendants liable for the consequences of their negligence; it was certainly in their power to use more diligence than they have done, and had they been the real holders of the bill, we are not ready to say that they could have looked to the plaintiff or his agent for

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Where a bank receives a bill of exchange for collection, and fails to demand payment of the acceptor or maker; and not using the ordinary diligence to secure the liability of the parties to it, they make it their own and become liable to the owner for the amount.

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payment. It is clear, that by failing to demand payment, and not using the ordinary diligence to secure the liability of the parties to the bill, the defendants have made it their own, and have become liable to the owner for the amount. 1 *Peters' Reports*, page 25.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A purchaser of property subject to a lien and privilege, is liable for the amount, and will be compelled to pay it, or give up the property.

The plaintiff took out an order of seizure and sale against a lot of ground, which he had sold to the defendant. In the mean time, one James Wright had obtained a judgment by attachment against the defendant, with a privilege on the lot for repairs made, and work done on it. The lot was sold under the plaintiff's order of seizure, and purchased in by him.

After some time had elapsed, James Wright intervened and took a rule on the plaintiff and sheriff, to show cause why the amount of his demand, (four hundred and nine dollars and forty-one cents,) should not be paid out of the proceeds of said lot, by preference and privilege.

On hearing this rule, Wright proved his demand and produced his judgment, with the workman's privilege, against the lot. The rule was made absolute, and the money ordered to be paid accordingly. The plaintiff appealed.

Elmore and King, for the plaintiff and appellant.

M'Millen, for the appellee.

Morphy, J., delivered the opinion of the court.

This case commenced by an order of seizure and sale sued out by plaintiff, against a piece of property he had sold to defendant. Before this proceeding took place, one J. Wright had proceeded by attachment in the Parish Court, against the defendant, a non-resident, and had obtained a judgment for four hundred and nine dollars and forty-one cents, with privilege on the property for work and labor done and materials furnished, in making banquets and gutters in front of the lot. Some time after the sale of the property, which was adjudicated to the plaintiff, Wright took a rule on the latter and the sheriff, to show cause why the amount of his judgment should not be paid by preference, out of the proceeds of the property sold. This rule was made absolute and the plaintiff appealed.

He has contended here, that the rule came too late; a settlement between him and the sheriff having already been made when it was taken; that the suit being thus at an end, no opposition or intervention could take place.

It appears from the evidence, that the plaintiff was apprized by the sheriff of the existence of this real charge on the property, and promised several times to satisfy it. This circumstance accounts for the delay of Wright on taking his rule, and explains why the sheriff made a settlement with the plaintiff, without insisting on the payment into his hands of a sum sufficient to discharge this privileged claim.

The plaintiff, having bought in his property at a price very inferior to that he had sold it for, after having received a large amount of cash, refuses, with a bad grace, to pay a claim for improvements which greatly enhance its value; and for which the law secures a lien and privilege. *Louisiana Code, articles 3216, 2747.*

It is, therefore, ordered that the judgment of the District Court be affirmed, with costs.

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LANUSSE vs. FREDERICK ET AL.

LANUSSE

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF

NEW-ORLEANS.

In this case, the points relied on in the defence are untenable, and the appeal frivolous. Judgment affirmed, with five per cent. damages, and bearing five per cent. interest.

This is an action against the maker and endorsers of a note.

The defendants pleaded a general denial; and averred, that said note was given for the price of property in Lafayette, of which they are in great danger of eviction, by Poultney's heirs; suit having been commenced against part, and threatened against all the possessors of property within the limits of the Poultney claim; and that the consideration has failed, and the plaintiff took said note, with full knowledge of this, after it was due.

There was no proof offered in the defence, at the trial. The plaintiff had judgment, and the defendants appealed.

Quemper, for the plaintiff.

Micou, contra.

Simon, J., delivered the opinion of the court.

This is a suit on a promissory note, against the maker and first endorsers thereof. A special defence is set up by the defendants, but no evidence has been adduced to support it. It is, however, contended, before us, that the demand of payment is not sufficient, as the notary has not alleged that he presented the note for payment; and that there is no evidence of the endorser's having received due notice of protest, as the notary says that he served the notice on Hyde & Goodrich, through Mr. Goodrich. An examination of the record has convinced us that these points, which do not appear to have been made in the lower court, are untenable;

and that the damages asked as for a frivolous appeal, ought to be allowed. EASTERN DIST.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs in both courts, and five per cent. damages. ST. MARTIN
VS.
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ST. MARTIN VS. HIS CREDITORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the evidence shows that the husband has received and converted to his own use the paraphernal property of his wife, in case of his insolvency, her or her heirs will have a legal mortgage, superior to that of other creditors, on his estate, for its restitution.

The heirs of Peirre Auguste St. Martin, the insolvent, made opposition to the tableau of distribution filed by René Lemounier, syndic of the creditors of the insolvent, claiming to be placed on said tableau as privileged and mortgaged creditors, of superior rank, for three thousand and thirty-seven dollars, the alleged amount of paraphernal property inherited by their deceased mother, and received by her husband, the insolvent, during marriage. The heirs of Yves Lemounier, who were already placed on the tableau as mortgaged creditors for four thousand one hundred and fifty dollars, claiming a preference by special mortgage, contested the claims of the opponents, which, if allowed, would deprive them of so much of their demand.

The opponents exhibited evidence of their claim, which showed satisfactorily that this sum had been received, as alleged, and that the privilege, for the restitution of it as paraphernal effects had the highest rank. Judgment was rendered, ordering the tableau to be amended; admitting

EASTERN DIST. the children and heirs of the insolvent as privileged creditors
May, 1840. of the first rank, for the sum of three thousand and thirty-
ST. MARTIN seven dollars. The syndic and Lemounier's heirs appealed.
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HIS CREDITORS.

Macready, for the appellants.

C. M. Conrad, contra.

Morphy, J., delivered the opinion of the court.

The children of the insolvent opposed the homologation of the tableau of distribution, filed by the syndic; they claimed to be privileged creditors for three thousand and thirty-seven dollars, being paraphernal property of their mother, Louisa Gustavie D'Arensbourg, which they alleged to have been received by their father from Zenon D'Arensbourg, her tutor, as accruing to her from the estates of her deceased parents. Their opposition being sustained below, an appeal was taken by the syndic, and by the heirs of Lemounier, as special mortgage creditors of the insolvent.

The appellants have contended, that the notarial act by which the sum claimed purports to have been paid by Zenon D'Arensbourg, is no evidence against third persons, and that if it is evidence, it establishes that the money has been received by the wife of the insolvent, and not by him.

This notarial receipt, which was executed in the parish of St. Charles, on the 26th of March, 1832, refers to accounts rendered in 1821, in the Probate Court of that parish, by one André Latour, a former tutor of the appellee's mother, from which it appears, that the said sum of three thousand and thirty-seven dollars was accruing to her from the estate of her deceased father; but independent of this act, there is evidence fully establishing that this sum, which was receipted for by the wife of the insolvent, had been previously paid to the latter, in a note of Z. D'Arensbourg, to his order, and that said note was given to Messrs. Plique & Le Beau, in payment of two notes of the insolvent, secured by mortgage on the very land which he afterwards surrendered to his creditors. The insolvent having thus converted to his own use the paraphernal property of his wife, her heirs have a

legal mortgage on his estate, to secure its restitution. *Louisiana Code, article 2367.* EASTERN DIST.
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It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs.

LILLARD
VS.
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LILLARD VS. TARBE, SYNDIC.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

When a syndic has been legally appointed, no individual creditor can sue him for a debt, or interfere with his administration. A creditor may call him to account, and produce his bank book, &c., but he cannot be harassed by suits, and with alleged fears of mismanagement, &c.

For malfeasance or gross negligence, a syndic may be removed from office, in due course of law, and made liable for damages in his individual capacity.

This is an action against the defendant, in which the plaintiff alleges, he is a creditor of the firm of Tarbe & Nash, who have made a surrender, and Tarbe has been appointed syndic.

He expressly alleges, that they have not made a fair surrender; that Tarbe has certain goods and merchandize in his possession and store, which he has never given up, and still retains, to the injury of the petitioner. He further states, that he fears said Tarbe will place said property and goods beyond the reach of creditors. He prays for a writ of sequestration and that the property be sequestered and held subject to the further order of court, or that it be sold for the benefit of creditors, and for general relief.

The sequestration was, on a rule taken by defendant on plaintiff, set aside.

The defendant then filed an exception, averring that there was no cause of action set forth in the petition, and that he, as syndic, could not be sued in this manner.

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The plaintiff appealed from the judgment on the rule setting aside the sequestration.

Greiner, Peyton, and Pierce, for the plaintiff; insisted that the suit was in the nature of a conservatory measure, to preserve and secure the property of the insolvent for the benefit of all the creditors, and that the sequestration was improperly set aside.

F. B. Conrad, for the defendant, contended :

1. The judgment appealed from is correct, and must be affirmed. The whole proceedings were illegal. There is no law authorizing suit to be instituted against a syndic; the plaintiff should have ruled him into court to file a tableau, and if guilty of malfeasance or negligence, should have caused him to be removed from the syndichip, and then sued him for damages, in his individual capacity. 6 *Martin*, N. S. 126; *Laws of 1837*, p. 96.

2. The sequestration was properly set aside; there is no law authorizing the writ to issue in such a case. *Code of Practice*, article 275; 2 *Moreau's Digest*, 426, section 9.

Morphy, J., delivered the opinion of the court.

When a syndic has been legally appointed, no individual creditor can sue him for a debt, or interfere with his administration. A creditor may call him to account, and produce his bank book, &c., but cannot be harassed by suits and with alleged fears of mismanagement, &c.

The plaintiff is appellant from a decree setting aside an order of sequestration, which he had previously obtained. This order had been issued, on his allegation that Tarbe & Nash had made a surrender of their property to their creditors, in the year 1837; that John Tarbe, one of the insolvents, had been appointed syndic of their creditors, and by the latter dispensed with giving security as such; that the defendant had illegally disposed of part of the property surrendered by selling it at private sale, and that he was about to dispose of a quantity of other property belonging to the estate, in the same illegal manner, to the prejudice of plaintiff, and that of all the other creditors. We think that the court below did not err. The whole proceeding appears to us irregular, and unwarranted by law. When a syndic has been legally appointed, and has taken charge of the estate, entrusted to

him, no individual creditor can sue him for a debt, or interfere with his administration. He may be ruled to produce his bank book, file a tableau of distribution, and pay privileged debts, &c., but he should not be suffered to be harassed by suits brought by individual creditors, who allege or fear mismanagement on his part. If he has been guilty of malfeasance, or gross negligence, he can, in due course of law, be removed from office, by the creditors, and made liable in damages, in his individual capacity. 6 *Martin, N. S.*, 126; *Laws of 1837*, page 96.

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For malfeasance or gross negligence, a syndic may be removed from office in due course of law, and made liable for damages in his individual capacity.

It is, therefore, ordered, that the judgment of the Parish Court be affirmed, with costs.

LOCKE AND CO. vs. DAKIN AND DAKIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where an auditor has been appointed, when he commences his proceedings, the first act is to take the oath, which must be in writing at the foot of the order of court, and annexed to his report.

In all cases, whether the auditors have been specially requested or not, by the party, they must be sworn, and must give notice to the adverse party.

The circumstance, that an auditor made his report without taking the oath, but swore to it before homologation, is insufficient to cure the defect. Had the auditor taken his oath at any time before completing his business, it would be sufficient.

This is an action on an account rendered, against the defendants, for materials and articles furnished, and work done at their instance, and employed in the building of four houses for Messrs. Field, Pritchard, Gasquet and Bringier. The plaintiffs pray for judgment against the defendants, for

EASTERN DIST. two thousand two hundred and eighty-eight dollars, the
May, 1840. amount of their account, to be paid by a privilege on the
buildings.

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VS.
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The defendants pleaded a general denial; and denied that the plaintiff had furnished materials and performed the work charged, and required strict and legal proof of their account; that a note of eight hundred dollars had been given and paid, which should be deducted; and took various other exceptions to the account.

After the cause was at issue, the court ordered it to be referred to auditors to examine and report on, and the parties were each required to name one. The plaintiffs named O. P. Jackson, Esq. Ten days after, the counsel for the plaintiffs took an order on the defendants, to show cause why the report of the auditor then filed, should not be confirmed.

The defendants opposed the confirmation of the auditor's report, on the ground that the auditor was not sworn according to law before proceeding to take the testimony of witnesses, and that said report is wholly incorrect.

It appears that some time after the report was made, and while the rule was pending to have the report confirmed, the auditor filed his affidavit to the fidelity of the report, and that no request had been made, by either of the parties, at the time of entering upon the duties of his appointment, to take the oath.

The judge presiding overruled the objections to the report, and made the rule absolute, by confirming it and making it the basis of his judgment, being for the plaintiff. The defendants appealed.

Carter, for the plaintiffs, prayed for the affirmance of the judgment, as being correct and full justice done to the parties. The auditor reported a balance of one thousand three hundred and twenty-nine dollars in favor of the plaintiffs, after allowing all credits.

2. The only objection made to this report, is the fact that the auditor was not sworn *before* he entered upon his duties. Upon this objection, being overruled by the court below, the

case now comes up. Judge Jackson was a sworn officer; both parties appeared before him, and no demand was made that he should be sworn as auditor. Before the report was confirmed, however, he took an oath that he had faithfully, &c., performed the duties of auditor in the case.

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The article 448, of the Code of Practice, says, that the auditor must, at the request of either of the parties, take an oath, &c. No request was made in this case.

I. W. Smith, and Elmore & King, for the defendants, insisted that the affidavit of the auditor, even if admissible in evidence, does not cure the radical defect of the auditor not having been previously sworn. *Code of Practice*, 448. The party who wishes to avail himself of the report, must show that the necessary formalities have been complied with.

Simon, J., delivered the opinion of the court.

Plaintiffs seek to recover a balance of account for materials furnished defendants for erecting four houses. The cause was referred to an auditor, who, after having taken, in writing, the testimony presented to him, reported a balance in favor of plaintiffs. The report was filed; and on the 14th of July, 1838, the plaintiffs' counsel obtained a rule on the defendants, to show cause why it should not be confirmed and made the judgment of the court. On the 25th, defendants show, among other causes, that the auditor had acted without being sworn, as required by law; and on the 31st the auditor, with the permission of the court, took an oath that he had, to the best of his knowledge and ability, performed the duties devolving on him as auditor, &c., and that no request had been made of him by either of the parties, to take the oath. The district judge overruled the objection, confirmed the report, and made it the basis of his judgment. From this judgment, the defendants have appealed.

The only question submitted to our consideration, is that resulting from the objection made to the report of the auditor, on the ground that he acted without being sworn. The

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Where an auditor has been appointed, when he commences his proceedings, the first act is to take the oath, which must be in writing at the foot of the order of court, and annexed to his report.

In all cases, whether the auditors have been specially requested or not, by the party, they must be sworn, and must give notice to the adverse party.

The circumstance that an auditor made his report without taking the oath, but swore to it before homologation, is insufficient to cure the defect. Had the auditor taken his oath at any time before completing his business, it would be sufficient.

article 448, of the Code of Practice, says, that "the auditor must, at the request of either of the parties, take an oath before any judge or justice of the peace, to perform faithfully his functions;" the oath must be taken in writing, at the foot of the copy of the order of the court, and must be annexed to the report. Hence, it is contended that no request having been made in this case, the auditor was at liberty to proceed without being sworn; and that, at all events, if an oath be necessary, it is sufficient if it be taken before the confirmation of the report. We cannot agree with the plaintiffs' counsel, and we think the district judge erred in overruling the objection. In our opinion, the expressions "*at the request of either of the parties*," used in the 448th article of the Code of Practice, indicate only that the auditor is to commence his proceedings at the request of one of the parties; and as the first proceeding is to take the oath, this is to be done after, or when one of them has requested him to act. Were we to adopt the construction contended for, it would follow not only that experts and auditors, would be permitted to act without the sanctity of an oath, if the parties forget or neglect to request them to be sworn, but that also the notice required by the article 450, might be dispensed with, and the auditors authorized to proceed *ex parte*, if not requested by one of the parties to give notice to the other.

This construction would certainly be absurd; and the only meaning we can give to the expressions used in articles 448 and 450, of the Code of Practice is, that experts and auditors ought to proceed, when they have been requested to do so by either of the parties; but in all cases, and whether they have been specially requested or not, they must be sworn, and must give notice to the adverse party.

The circumstance in this case, that the auditor took an oath before the homologation of the report, is not, in our opinion, sufficient to cure the defect. His report had been signed and filed, the rule to show cause had been served on the adverse party, and their objections were regularly before the court. So far, the auditor had acted illegally; and it was not in his power, nor in the power of the court, to deprive

the defendant of the benefit of their legal objections. Had the auditor taken his oath at any time before completing his proceedings, and before signing the report, we should have been disposed to consider it sufficient; but in this case, we think it was too late.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the report of the auditor be set aside, and that this case be remanded to the District Court for new proceedings, according to law; the plaintiffs and appellees paying costs in this court.

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M'AULEY
VS.
BARNES.

M'AULEY VS. BARNES.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

An association for the purpose of carrying on "the cotton pressing business," is an ordinary partnership; and an acceptance by the *firm* only binds each partner for his proportion of the debt.

This is an action by the drawer against the firm of Tilghman & Barnes, as the acceptors of a draft, and judgment is prayed against Barnes alone. He appeared, pleaded the general issue, and averred, that if he is liable at all, it is only for one-half of the draft sued on; their firm being an ordinary partnership.

The articles of association stipulate that H. L. Tilghman and W. Barnes, "agree to become co-partners and carry on, for their joint account, the business of *cotton pressing*," under the style and firm of "Tilghman & Barnes." The draft sued on was accepted by the firm.

There was judgment for the plaintiff, for the amount of the draft, and the defendant appealed.

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M'AULEY
vs.
BARNES.

Collens, for the defendant and appellant, contended that the acceptance was by an ordinary partnership, and that the defendant could not be made liable for more than one-half of the draft sued on. *Louisiana Code, articles 2843—4.*

Kennedy, contra.

Morphy, J., delivered the opinion of the court.

The defendant being sued on an acceptance of the late firm of Tilghman & Barnes, answers that he is liable only for one-half of the claim, because Tilghman and himself were ordinary, not commercial partners. From the deed of co-partnership, it appears they undertook together the business of cotton pressing; it does not appear, from the evidence, that they did any other kind of business, which, under article 2796 of the Louisiana Code, would give to their association the character of a commercial partnership. Being, then, a member of an ordinary partnership, defendant can be made liable only for one-half of the debt. *Louisiana Code, articles 2843—4.*

It is, therefore, ordered, that the judgment of the Commercial Court be avoided and reversed; and it is further ordered that the plaintiff, J. M'Auley, do recover of the defendant, William Barnes, the sum of one hundred and sixty-four dollars and twenty-two cents, with five per cent. interest per annum thereon, from the 17th of August, 1839, until paid, and three dollars and fifty cents costs of protest, and costs of suit in the court below; those of this appeal to be borne by the plaintiff and appellee.

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May, 1840.

PARMELE AND BAKER vs. JOHNSTON.

PARMELE AND
BAKER
vs.
JOHNSTON.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

An affidavit in which one of the members swears that "the defendant is really indebted to the firm," in the sum claimed, it is sufficient to support an attachment.

Where prescription is first pleaded in the Supreme Court, and it is necessary to remand the case for a new trial, on this plea the appellant, for whose benefit it is, must pay the costs of the appeal.

This suit commenced by attachment. Parmele swears, that "he is a partner of the firm of Parmele & Baker, and that James H. Johnston is really indebted to said firm in the sum of five hundred and ninety-two dollars and seventy-five cents, &c. On the same day, the writ was put in the hands of the sheriff, and property attached in the hands of Taylor, Gardiner & Co., who were cited as garnishees.

On the next day, the plaintiffs filed their petition, and claimed judgment on a note of the defendant, dated March 30th, 1833, payable six months after date, with a credit endorsed, leaving the balance now claimed. There was also interrogatories propounded to the garnishees.

The attorney appointed to defend, pleaded a general denial; and denied that the property attached, belonged to the defendant, but to the firm of Johnston & Harrison, of Arkansas, and prays that the attachment be dissolved.

It appears from the record, that this suit was instituted the 27th April, 1839, and the note sued on became due and payable the 30th September, 1833, nearly six years before suit.

The parties went to trial on this issue; and there was judgment for the plaintiffs, from which the defendant's attorney took an appeal.

Wharton, for the plaintiffs, prayed the affirmance of the judgment.

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T. Slidell, for the defendant, insisted that the attachment was illegally obtained. The affidavit does not allege that the debt is due. *Code of Practice*, 242—3.

2. A proceeding by attachment is a rigorous remedy, and must be strictly pursued. The affidavit cannot be aided by reference to the petition, when it is not filed, until the day after the affidavit. The law is conclusive, that the affidavit must declare the debt to be due. *Millaudon vs. Foucher*, 8 *Louisiana Reports*, 582.

3. The note sued on is prescribed by lapse of five years from the time it became due and payable, and there is no proof in the record to rebut prescription.

Morphy, J., delivered the opinion of the court.

This suit commenced by attachment ; on the day after it was sued out, the plaintiffs filed their petition, claiming five hundred and ninety-two dollars and seventy-five cents, on a note of defendant to their order. An attorney was appointed to represent the absent defendant, who filed a general denial. Judgment being rendered in favor of plaintiffs, the attorney for defendants appealed.

In this court, two points are made :

1. That the attachment was illegally obtained, because the affidavit does not allege the debt to be due.

2. That the debt is prescribed.

An affidavit in which one of the members swears that "the defendant is really indebted to the firm," in the sum claimed, it is sufficient to support attachment.

Where prescription is first pleaded in the Supreme Court, and it is necessary to remand the case for a new trial on this plea, the appellant, for whose benefit it is, must pay the costs of the appeal.

I. One of the plaintiffs swears that defendant is *really indebted* to the firm in the sum of five hundred and ninety-two dollars and seventy-five cents, and that he resides out of the state of Louisiana : the expressions used by the affiant do, in our opinion, convey the idea of a debt actually due and payable, not one *debitum in presenti, solvendum in futuro* : In point of fact, the plea of prescription, set up by the appellant, shows how the debt stood in relation to its maturity.

II. Prescription not having been pleaded in the inferior court, the appellee claims, and we think he is entitled to have the case remanded for trial on this plea, *Code of Practice*, article 992 ; and as the judgment appealed from would

be affirmed, but for this plea, it appears to us that the costs of this appeal should not be borne by the appellee. EASTERN DIST.
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It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be avoided and reversed, and it is further ordered, that this case be remanded, to be proceeded in according to law, the defendant and appellant paying the costs of this appeal.

EXCHANGE AND
BANKING CO.
vs.
WALDEN.

EXCHANGE AND BANKING COMPANY vs. WALDEN.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where the facts are fully stated in the petition, and the appellant swears that "the matters of fact set forth in the petition, are true and correct," it is sufficient to support an injunction; for if the facts are false, the oath would subject the party to the penalties of perjury.

The article 739 of the *Code of Practice*, points out the *only* reasons for which the sale of mortgaged property, by the executory process, can be arrested.

A mortgage for a principal sum, secures also the interest and costs in enforcing payment.

Taking a note in renewal of one secured by mortgage, is no novation when the first one is not given up.

In the executory process, no copy of the petition is required to be served on the defendant. A simple notice is necessary.

Want of amicable demand does not authorize an injunction, to prevent or delay the payment of a debt.

This case commenced with the executory process. The plaintiffs obtained an order of seizure and sale against a lot of ground and the buildings and improvements thereon, mortgaged to them to secure the payment of the defendant's note, payable to their order, and due and protested for non-pay-

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ment. A new note had been given in renewal of the one marked *ne varietur*, which had been retained, and both were annexed to the petition.

The defendant opposed the sale, and applied for, and obtained an injunction on several grounds :

1. Interest and costs of protest are not included in the mortgage, which is only for a specific sum or debt.

2. That defendant had paid a part of the original note, secured by mortgage, and given a new note in renewal for the balance ; that the plaintiffs are proceeding on the original note, without giving up or accounting for the new one.

3. The petitioners allege, they have annexed their act of mortgage, and made it part of their petition, but have never served a copy of the same on defendants, as the law requires.

4. The defendant denies that he has ever been put in default, or that any amicable demand has been made on him for the debt.

5. That the proceedings are irregular and illegal. The defendant swears in his affidavit for the injunction, " that the matters set forth in the petition are true and correct, &c.," and " that the matters of law therein alleged, he is informed and verily believes to be correct, &c."

The plaintiffs denied the matters set forth in the injunction ; averred that the affidavit was insufficient ; and prayed that it be dissolved, as frivolous upon its face. A rule was taken on the defendant to show cause why the injunction should not be dissolved and set aside, with damages, &c.

On hearing the parties, the rule was made absolute, and the injunction set aside with costs. The defendant appealed.

L. Peirce, for the plaintiff, prayed the affirmance of the judgment.

F. B. Conrad, for the defendant, insisted the judgment should be reversed, as unconstitutional, for want of reasons.

2. That it was improperly dissolved on the face of the proceedings, which are to be taken as true. The proceedings show that the plaintiff was claiming a larger amount

that the defendant owed, and for which the mortgage was given. EASTERN DIST.
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3. That another note was given in renewal of the mortgage note which is not accounted for, while the plaintiffs are proceeding to sell the mortgaged property for the balance due on the mortgage. There is no authentic evidence of any amicable demand to authorize such proceedings.

EXCHANGE AND
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Simon, J., delivered the opinion of the court.

The plaintiffs, having obtained an order of seizure and sale of certain property mortgaged, to secure a debt due them by the defendant; defendant opposed the execution of the writ, and sued out an injunction to stay the proceedings until the further order of the court. The principal grounds on which this opposition is founded, are: 1. That the plaintiffs claim to have a mortgage for a larger amount than the mortgage secures, as the interest claimed and costs of protest are not secured by the mortgage. 2. That a part of the original debt having been paid, the balance due is a sum of three thousand six hundred dollars, for which defendant gave a note which must be accounted for. 3. That a copy of the act of mortgage has been made a part of the petition, and has not been served on the defendant. 4. That no amicable demand has been made. Without answering to the merits of the opposition, plaintiffs obtained a rule on the defendant, to show cause why the injunction should not be dissolved, on the grounds that the affidavit and the matters set forth in the petition for an injunction are insufficient and contrary to law. The parish judge dissolved the injunction, and the defendant appealed.

The affidavit of the defendant appears to be sufficient; he swears that the "matters set forth in the petition, are true and correct." This is undoubtedly within the meaning of article 304, of the Code of Practice; the facts are fully stated in the petition, and if false, the oath would subject the defendant to the penalties of perjury. *13 Louisiana Reports, page 46.*

Where the facts are fully stated in the petition, and the affiant swears that "the matters of fact set forth in the petition are true and correct," it is sufficient to support an injunction; for if the facts are false, the oath would subject the party to the penalties of perjury.

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The article 739 of the Code of Practice, points out the only reasons for which the sale of mortgaged property by the executory process, can be arrested.

A mortgage for a principal sum, secures also the interest and costs, in enforcing payment.

Taking a note in renewal of one secured by mortgage, is no novation when the first one is not given up.

In the executory process, no copy of the petition is required to be served on the defendant. A simple notice is necessary.

Want of amicable demand does not authorize an injunction to prevent or delay the payment of a debt.

The grounds on which the injunction was obtained, are not within the 739th article of the Code of Practice, which points out the only reasons for which the sale of property mortgaged by executory process, can be arrested, and are certainly insufficient in themselves to authorize the issuing of the writ :

I. The interest accruing on the principal amount of a debt secured by mortgage, and the costs necessary to enforce it, are also secured by the same mortgage, and are to be paid out of the proceeds of the sale of the property.

II. The taking of a note in renewal of one secured by mortgage, operates no novation, 3 *Martin's Reports*, 431; the first note having not been surrendered by the creditor, 1 *Louisiana Reports*, 527; 4 *Louisiana Reports*, 512. In that case, the plaintiffs have sufficiently accounted for the renewed note, by filing it with their petition, and showing thereby that they are still the holders thereof.

III. There is no law that requires, in executory process, that a copy of the petition be served on the defendant; a simple notice is sufficient. *Code of Practice*, article, 734 and 735.

IV. Want of amicable demand cannot authorize the issuing of an injunction to prevent or delay the payment of a debt. In this case, the protest of the note, which necessitated a demand of payment, may be considered sufficient to put the defendant *in morâ*. The order of seizure and sale was granted a few days after the protest.

Under this view of the case, we think the parish judge did not err in making the rule absolute, and dissolving the injunction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

TRIER VS. HOLMES.

EASTERN DIST.
May, 1840.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

TRIER
VS.
HOLMES.

Where the appeal has been brought up, without the evidence having been reduced to writing, and no error is assigned, it will be considered as a delay case, and the judgment affirmed, with the maximum of damages.

This is an action against the maker of a promissory note. The defendant denied owing the plaintiff any thing, as he received no value for the note.

On the trial, the plaintiff produced the note and protest in evidence, and also the testimony of a witness, which was not taken down in writing. The clerk and judge both certify this fact. There was judgment for the plaintiff, and defendant appealed.

Josephs, for the plaintiff.

Preston and Larue, for the defendant and appellant.

Morphy, J., delivered the opinion of the court.

The defendant being decreed to pay the amount of a note drawn by him to the order of Walker and Schloss, and endorsed by the latter to the plaintiff, has appealed. It appearing from the clerk's certificate that the evidence has not been reduced to writing, we are bound to presume that the judgment appealed from has been rendered on proper and sufficient evidence. It is the duty of the appellant to place his case before us, with all the evidence adduced below; and not having taken the trouble to do this, and no error being assigned as apparent on the face of the record, delay must have been the sole object of this appeal.

It is, therefore, ordered, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

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FAURES
vs.
COINÇON.

FAURES vs. COINÇON.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

A contract, or agreement, which has never been perfected, and not having been adhered to and signed by all the contemplated parties, is not binding on those who have signed.

This is an action against the maker of a promissory note.

There was, first, a plea of the general issue, and admitting the signature; and in a supplemental answer, the further plea of a prolongation of time of payment, for eighteen, twenty-four and thirty-six months; a kind of voluntary respite. A document to support this plea, signed by three or four creditors, and among them the plaintiff, consenting to give this time on condition that all agreed to it, or signed. Many of the creditors refused, or failed to sign.

The judge presiding, however, seemed to be of opinion that the suit was premature, non-suited the plaintiff, and he appealed.

Mitchell, for the plaintiff.

Canon, contra.

Simon, J., delivered the opinion of the court.

This is a suit on a promissory note. On the day fixed for the trial, the defendant, who had originally joined issue by admitting his signature, asked leave to amend his answer, in order to set up that since the case had been put at issue, the plaintiff had agreed to grant him the delay of eighteen, twenty-four and thirty-six months, to pay the debt. The amendment was permitted by the court, and the plaintiff took his bill of exceptions. There was judgment as in case of non-suit, and for costs, against the plaintiff; from which judgment he appealed.

On the trial of the suit, the defendant produced a document signed by plaintiff, purporting to be a general consent, given by defendant's creditors, to grant him a certain delay

to pay his debts. It says: *Nous soussignés, créanciers de la maison Coinçon & Cie., &c., consentons et par le présent nous engageons à accorder au dit sieur F. X. Coinçon, &c.* It contains a list of the names of numerous creditors, and of the amounts due them respectively, and appears to have been drawn for the purpose of getting all the creditors, therein named, to sign it, and grant a voluntary respite. Four creditors, only, have signed the instrument, and among them the plaintiff, who consented, conditionally, and "*en cas qu'aucun des créanciers ci-contre mentionnés ait un privilège avant une créance.*"

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vs.
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It seems, to us, clear that the contract has never been perfected, and that having not been adhered to and signed by all the contemplated parties, it is not binding on those who have signed it. 3 *Martin*, 326 ; 5 *Martin*, 677 ; 4 *Louisiana Reports*, 553. The creditors who have not signed the agreement, would be left at liberty to enforce their rights ; and were we to decide that the contract is obligatory on the plaintiff, the condition under which he gave his consent would become vain and ineffectual, as the other creditors, by being allowed to proceed against the debtor, would certainly have the means of obtaining an advantage, or a preference over the plaintiff.

A contract or agreement, which has never been perfected, and not having been adhered to and signed by all the contemplated parties, is not binding on those who have signed.

Had the contract been binding upon the plaintiff, we are not ready to say that he could not have proceeded to judgment in order to liquidate his claim, and that its effect ought not to be understood beyond a mere stay of execution during the time agreed on, provided the debtor faithfully complied with his obligations.

Under this view of the question, it becomes unnecessary to examine the bill of exceptions.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be annulled, avoided and reversed ; and this court, proceeding to give such judgment as ought to have been rendered in the lower court, it is ordered, adjudged and decreed, that the plaintiff do recover of the defendant the sum of three hundred and nine dollars,

EASTERN DIST. with five per cent. interest per annum from the 15th of
May, 1840. December, 1839, until paid, costs of protest, and costs in both
 suits.
PASSEBON
VS.
HIS CREDITORS.

PASSEBON VS. HIS CREDITORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
 NEW-ORLEANS.

In questions of fraud which are particularly the province of a jury, their verdict must be conclusive, unless clearly against the evidence.

This case commenced by a surrender and application on the part of the plaintiff and insolvent, for the benefit of the insolvent laws. Some of the creditors charged fraud, and denied him the relief and protection of those laws, and that he acted in gross fraud of creditors, in not making a fair surrender of his property, and exhibit of his affairs.

This case has been before this court on a former appeal, and remanded for a new trial. It was submitted to another jury, on the return of the case, and there was a verdict and judgment for the defendant, and the syndic appealed.

Soulé for the appellant.

Pichot and *Buisson*, for the defendant.

Simon, J., delivered the opinion of the court.

This case was remanded for a new trial, (see 10 *Louisiana Reports*, page 36,) and the jury found again a verdict in favor of the insolvent. The only question is one of fraud, which is particularly of the province of a jury; and their verdict must be conclusive, unless clearly in opposition to the evidence. We think the verdict in this case ought not to be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

HALL vs. GAIENNIÉ.

EASTERN DIST.
May, 1840.APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.HALL
vs.
GAIENNIÉ.

Appeal for delay, and judgment affirmed, *without* damages, as none were asked.

This is an action against the drawer and acceptors of a bill, payable twelve months after date. The defendant, Gaiennié, averred that Doughty, the drawer of the bill, and who is also the debtor, assured them he had settled with the plaintiff, and would soon be in the city; wherefore he reserved all exceptions, &c., and required strict proof.

There was judgment against all the defendants, and Gaiennié alone appealed.

Roselius, for the plaintiff.

C. Janin, for the appellant.

Simon, J., delivered the opinion of the court.

Plaintiff sues to recover the amount of a bill of exchange, drawn by one Doughty, and accepted by defendants, payable twelve months after its date. The bill was duly protested for non-payment at maturity. There was judgment below in favor of the plaintiff, against the defendants *in solido*; and one of them, Gaiennié, appealed.

Delay, appears clearly to have been the only object of the appellant, in bringing up this appeal; and had the appellee prayed for damages as for a frivolous appeal, he would have been entitled to the maximum.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

EASTERN DIST.

May, 1840.

GIBSON & CO.

vs.

ANDLER ET AL.

GIBSON AND CO. vs. ANDLER ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Appeal for delay, and judgment affirmed, with the maximum of damages.

This is an action against the maker and endorser of a promissory note. The defendants pleaded the general issue, and denied that the plaintiffs were the true owners, or ever gave any valuable consideration for the note sued on.

There are two bills of exception: 1st, to setting down the cause for trial on a Thursday, instead of Monday, the day set apart for promissory note cases; 2d, To allowing the plaintiff to strike out the endorsement of one Dykes, from the note, it having been discounted and passed to his credit in bank. No evidence was produced in the defence.

Judgment was rendered against the defendants *in solido*, and they appealed.

Grima, for the plaintiffs.

Grivot, contra, urged as a defence, and for reversal of the judgment, the matters stated in the bills of exception.

Morphy, J., delivered the opinion of the court.

This is an appeal from a judgment rendered against defendants, as the drawer and endorser of a promissory note held by plaintiff. We have looked through the record, without finding in it any thing on which a serious defence could be based, in either court, and must, therefore, allow the damages prayed for by the appellees.

It is, therefore, ordered that the judgment of the court below be affirmed, with costs, and ten per cent. damages.

BENNET *vs* CROCKER ET AL., F. P. C.EASTERN DIST.
May, 1840.APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.BENNET
vs.
CROCKER ET AL.
F. P. C.

Damages will not be allowed, as for a frivolous appeal, when it appears there has been no amicable demand, and the want of it is specially pleaded.

This is an action against the maker and endorser of a promissory note, under protest. The defendants admitted their signatures, pleaded the general issue and the want of amicable demand.

There was judgment *in solido* against the defendants, on the production of the note and protest, and Crocker alone appealed.

Eyma, for the plaintiff, prayed the affirmance of the judgment, with damages.

Divigneaud, contra.

Morphy, J., delivered the opinion of the court.

This suit is on a promissory note, the amount of which defendants were decreed *in solido* to pay. Crocker appealed. We would affirm this judgment, with damages, as prayed for by appellee, were it not that the record exhibits no proof of amicable demand, and that the want of it is specially pleaded.

It is, therefore, ordered that the judgment of the Parish Court be avoided and reversed, as relates to Crocker, and that the plaintiff recover from the said defendant, the sum of six hundred dollars, with legal interest from the 11th of May, 1839, till paid, three dollars cost of protest, and the costs of the District Court made after the first appearance of the defendant, inclusively; the remaining costs in the District Court, and the costs of this appeal, to be paid by the plaintiff and appellee.

EASTERN DIST.

May, 1840.

GIBSON AND CO. vs. J. AND J. BELLOW.

KIRKMAN ET AL.

vs.

POLLITT AND

THORN.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Judgment affirmed with ten per cent damages, as a frivolous appeal.

This is an action against the maker and endorser of a promissory note.

The defendants pleaded the general issue, and denied that the plaintiffs were the legal holders of the note sued on.

On the production of the note and protest, the plaintiffs had judgment *in solido*, and the defendants appealed.

Grima, for the plaintiffs, urged the affirmance of the judgment, with damages.

Morphy, J., delivered the opinion of the court.

The judgment appealed from is one rendered against defendants, *in solido*, as the drawer and endorser of a promissory note held by plaintiffs; no defence has been attempted in either court.

It is, therefore, ordered, that the judgment of the Parish Court be affirmed, with costs, and ten per cent damages.

KIRKMAN ET AL. vs. POLLITT & THORN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The appeal dismissed, for want of *all* the evidence to try the case on its merits.

The clerk's certificate to the record, states that it contains all the evidence "*except the document withdrawn by agreement.*" This was a record of the City Court, which both parties agreed might be withdrawn without diminution of the record, and each to have such papers copied from it as they might

want to use. The suit was by attachment, and judgment obtained against the defendant, Pollitt, to be satisfied out of funds attached in the hands of Thorn, and he alone appealed.

EASTERN DIST.
May, 1840.

PARKHILL
VS.
LOCKE ET AL.

Elwyn, for the plaintiffs.

Potts, for the defendants, insisted that the court could not compel the parties to use testimony they did not want, and that the record contained all that was necessary to the decision of the case.

Bullard, J., delivered the opinion of the court.

The garnishee is appellant from a judgment against him, but he has not put it in our power to examine the case upon its merits, all the evidence given below not being in the transcript.

The appeal is, therefore, dismissed, with costs.

PARKHILL VS. LOCKE ET AL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Appeal for delay, and judgment affirmed, with the maximum of damages.

This is an action against the endorsers of a note. The defendants pleaded general denial. There was judgment against them, and they appealed.

No serious defence was offered in the court below, and none made in this court.

Peyton, for the plaintiff, prayed for the affirmance of the judgment, with damages as for a frivolous appeal.

Durell, contra.

CASES IN THE SUPREME COURT

EASTERN DIST.
May, 1840.

NELSON
VS.
CLAYTON.

Morphy, J., delivered the opinion of the court.

The defendants have appealed from a decree rendered against them as endorsers of a promissory note held by plaintiff. They have made no serious defence below, and have not attempted to show in what respect the judgment they complain of is erroneous.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs, and ten per cent. damages.

NELSON VS. CLAYTON.

APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

Frivolous appeal and judgment affirmed, with the maximum of damages.

This is an action on two promissory notes, against the maker. A general denial was pleaded, but no defence made at the trial. The plaintiff had judgment, and the defendants appealed.

Kennicott, for the plaintiff.

Durant, contra.

Simon, J., delivered the opinion of the court.

This is a suit on two promissory notes. The defence is a general denial. Plaintiff proved his demand, and had judgment. This is, clearly, a frivolous appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be affirmed, with costs in both courts, and with the maximum of damages, as for a frivolous appeal.

WILDS & CO. VS. BARRETT & CO.

EASTERN DIST.
May, 1940.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

WILDS & CO.
VS.
BARRETT & CO.

Judgment drawing five per cent. interest, affirmed with five per cent. damages, as for a frivolous appeal.

This is an action on five promissory notes, against the defendants, as makers, and S. Peyroux, as endorser. There was no serious defence set up, and none attempted to be proved. Judgment was rendered for the whole amount claimed, bearing five per cent. interest. The defendants appealed.

G. B. Duncan, for the plaintiffs.

Briggs, contra.

Morphy, J., delivered the opinion of the court.

The defendants appeal from a judgment rendered against them, as drawers and endorsers of five promissory notes, amounting, together, to sixteen thousand, six hundred and twenty-five dollars and fifty cents. No serious defence having been made below, nor any offered in this court, appellees are entitled to the damages they ask; but, as these damages must be an equivalent for the loss which they have sustained by the delay consequent on the appeal, we do not think that more than five per cent. should be allowed in this case.

It is, therefore, ordered, that the judgment of the Commercial Court be affirmed, with costs, and five per cent. damages.

EASTERN DIST.

May, 1840.

HUGHES VS. HIS CREDITORS.

HUGHES
VS.
HIS CREDITORS.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-
ORLEANS.

The syndicism is a personal trust which cannot be delegated to another.

The syndic may empower an agent to do a particular act, especially in a place distant from his domicil.

The court is not authorized to remove a syndic from office for mere absence from the state, no matter how short. It is not a momentary absence from the state, but the personal neglect of the interests confided to him, that justify his removal.

The creditors should be the judges, whether their interests require another syndic should be appointed; who, although under the supervision of the court, is properly the mandatory of the creditors.

On the 28th May, 1838, P. Soulé, Esquire, one of the creditors of the insolvent, came and informed the court, that J. B. Marks, who was appointed syndic of the creditors of the insolvent, had, without leave or authority, absented himself from the state; took a rule, that he be notified at the place of his domicil, to show cause within ten days, why he should not be removed from office, and a new syndic appointed. The attorney of the syndic in answer to the ruled, stated that on leaving the state temporarily for the benefit of his health, he had left an agent duly authorized to represent him; and that such absence is not cause of removal.

On the trial, the judge presiding was of opinion that the syndic being admitted to be a notary public, domiciliated in the city and parish of New-Orleans, had no right to transfer his charge to an attorney in fact, made the rule absolute; and removed the syndic from his appointment. His attorney appealed.

Benjamin, for the appellant.

1. The syndic is rather the mandatory of the creditors, than an officer of the court. His appointment comes from the creditors, and although his administration is subject to the supervision of the court, yet the contract of mandate between

him and the creditors cannot be annulled by the judge, who should have ordered a meeting of creditors, to determine whether they wished to appoint another syndic, or were satisfied with the administration of Marks.

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HUGHES
VS.
HIS CREDITORS.

2. If, in the absence of express statutory law relative to syndics, we recur to analogous cases, the error of the court below will appear still more clearly. There is no office known to our law, of which the duties are so similar to those of syndics, as the office of curator of vacant successions. In very numerous points of administration their duties are precisely the same. But the Civil Code, far from depriving a curator of his office, on account of a temporary absence, expressly permits it, provided the curator do what the syndic did in the present case, *i. e.* appoint an agent to represent him, and, provided also, no damage accrues to the creditors. See *Louisiana Code*, 1145, 1149, section 3.

Cohen, on the same side, contended that there was no law authorizing this proceeding, or empowering the judge to remove a syndic.

Soulé, contra.

Morphy, J., delivered the opinion of the court.

Joseph B. Marks is appellant from a decree of the Parish Court, removing him from the office of syndic of the creditors of this insolvent. This order was made, on a rule to that effect, taken by P. Soulé, one of the creditors. The ground assumed was that the syndic had absented himself from the state without leave or authority. The latter, in answer to this rule, averred that on leaving the state, he had left agents duly authorized to represent him; that his absence, which was temporary, had been rendered necessary by the state of his health, and was not such a cause as authorized his removal: he annexed to his answer a power of attorney which he had left with J. B. Marks and M. M. Cohen, authorizing them to act in his behalf as syndic of the creditors of the insolvent, during such temporary absence. The appellant was admitted to be a duly commissioned notary public

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HIS CREDITORS.

The syndi-
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The creditors
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the supervision
of the court, is
properly the
mandatory of
the creditors.

of this city. The judge below was of opinion that the appointed syndic had no right to transfer his trust and functions to an attorney in fact. He removed the appellant from office, and on the same day ordered a meeting of the creditors to be held in order to elect another syndic, to take charge of the affairs of the estate.

We think, with the judge *a quo*, that the syndicship is such a personal trust as cannot be assigned over or delegated to another; the syndic for his own convenience and at his own risk, may empower an agent to do particular acts, especially in a place distant from his domicile; but he cannot transfer his authority and powers as syndic to another. If he could, he would be substituting another syndic in lieu of the one appointed by the majority of the creditors, and recognized by the court. If, then, the act of leaving the state, even temporarily, was of itself a sufficient ground for removal, a power of attorney left behind him by the delinquent would not have availed him, but we are aware of no law authorizing the judge to pronounce such removal, and declaring any absence from the state, however short, a good cause for it, nor do we find the temporary absence of an agent mentioned among the causes which extinguish the contract of mandate. *Louisiana Code, article 2996; Pothier, contrat de mandat, number 139.* If the judge below was correct, a single day's absence from the state would deprive a syndic of his office, when our citizens are notoriously in the habit of making short trips to various places of resort over the lake as a relaxation during the summer season, when there is little or no business doing. It cannot be the bare fact of a momentary absence from the state that would justify the removal of a syndic, but the presumed neglect of the interests confided to him, and the injury likely to flow from his absence, if of any duration.

There being no positive enactment on the subject, it appears to us that the creditors themselves should be made the judges in such cases, whether their interest requires that another syndic should be appointed: although acting under the supervision of the court, the syndic is properly the man

datory of the creditors, from whom he receives his appointment. On complaint being made that the appointed syndic had departed from the state, we think that the judge should not have went beyond ordering, as he did, a meeting of the creditors. As to what they have done at their meeting, we are uninformed; but we can only say that it rested with them to determine for themselves the course to be pursued most consonant to their interests.

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BRAND
vs.
JONES.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Parish Court be avoided and reversed; and it is further ordered, that the rule taken in the premises be discharged, with costs in both courts.

BRAND vs. JONES.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

There is no appeal from a judgment, by consent.

No evidence can be received in the Supreme Court that a judgment by consent was entered up differently from the consent and agreement between the parties.

A judgment of the inferior court cannot be corrected and amended in the Supreme Court, even by consent.

This is an action on a promissory note for four hundred and thirty-seven dollars and fifty cents, given for rent of a house, and for one hundred dollars damages on account of injuries done to the house, and further, that the furniture be provisionally seized.

The defendant pleaded a general denial, and averred that he was not indebted for damages, and that a claim for damages could not be cumulated with a suit on a note; and

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vs.
JONES.

further, that the plaintiff was indebted to him in the sum of one hundred and fifty dollars for necessary repairs put on the house ; fifty dollars for professional services, and fifty dollars damages for vexatious and illegal proceedings against him, and that the defendant be condemned to deliver up a note of his in his possession. Some further pleadings were made in the case.

There was judgment by *consent of parties*, for the amount of the note sued on, with interest, and defendant appealed.

E. A. Bradford, for the plaintiff.

M^cCaleb, contra.

Morphy, J., delivered the opinion of the court.

There is no appeal from a judgment by consent.

No evidence can be received in the Supreme Court that a judgment by consent was entered up differently from the consent and agreement between the parties.

A judgment of the inferior court cannot be corrected and amended in the Supreme Court, even by consent.

This appeal has been taken from a judgment purporting to have been entered up by consent below ; from such judgments no appeal lies according to article 567 of the Code of Practice. It has been said by appellant's counsel, and this without positive contradiction from the opposite party, that the judgment has not been drawn up according to the consent and understanding of the defendant. The agreement which was the basis of this judgment, not being before us, we cannot say, nor have the counsel distinctly stated in what the error consists ; if there has been any, it might have been corrected by amending the judgment, by consent or by means of a new trial in the court below ; we do not see what relief the appellant can obtain at our hands ; we cannot hear testimony as to what the understanding of the parties was, nor can we suffer the judgment of the inferior court to be amended here, even by their consent ; we are prohibited from listening to this appeal :

It is, therefore, ordered, that it be dismissed, with costs.

MORGAN VS. DRIGGS ET AL.

EASTERN DIST.
June, 1840.APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, FOR THE
PARISH OF POINT COUPEE, THE JUDGE OF THE SECOND DISTRICT PRESIDING.MORGAN
VS.
DRIGGS ET AL.

In a possessory action, the plaintiff must show his possession by definite objects, and that he has been disturbed. Where the *locus in quo* is so uncertain that it is impossible to determine whether the defendant's possession extends, or not, over any part of the tract of land claimed by the plaintiff, he cannot recover.

This is a possessory action. The plaintiff alleges, that he is the owner, and has been for some time in the quiet possession of a tract of land in Tunica Bend of the Mississippi, containing twenty arpents front, by the depth of forty, with scertain definite boundaries. He alleges, that the defendants, within a year past, have illegally and forcibly taken possession of it, and cut down wood and destroyed timber, &c., to his great injury and damage. He prays that the defendants be enjoined and prohibited from disturbing and committing waste on said premises, and that he be forever quieted in the possession, and have one thousand dollars in damages for the injury done him.

There was a general denial pleaded. The cause was twice tried. In the last trial, the judge presiding went into a minute examination of the evidence and facts of the case, and was of opinion there was not such a showing on the part of the plaintiff as to entitle him to recover. There was judgment for the defendant, and the plaintiff appealed.

Stevens and Ilsley, for the plaintiff and appellant.

Preston and Thomas, for the defendant.

Simon, J., delivered the opinion of the court.

This is a possessory action. The plaintiff alleges, that for more than one year previous to instituting the present action, he was in the peaceable, real and actual possession of a tract of land fronting on the Mississippi river, having twenty

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VS.
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arpents in front by forty in depth, which he purchased at sheriff's sale, and that the defendants, within the last year, have taken illegal and tortious possession thereof. He prays to be restored to his former possession, and for damages. The defence is a general denial. The District Court rendered a first judgment in favor of the defendants, against the plaintiff; and a new trial having been granted on the ground of newly discovered evidence, the second judgment of the District Court, after a full investigation of all the facts of possession which the plaintiff was able to prove, was again in favor of the defendants. From this last judgment, the plaintiff has taken the present appeal.

A careful and attentive perusal of the evidence found in the record, has brought us to the conclusion that the district judge did not err in giving his judgment in favor of the defendants. The plaintiff has certainly failed to establish such possession as, under the 49th article of the Code of Practice, would entitle him to a possessory action. The *locus in quo* is so uncertain, that it is impossible to determine whether the defendant's possession extends, or not, over any part of the tract of land claimed by plaintiff under his sheriff's sale. In his petition, he alleges his possession to be of a tract of twenty arpents in front by forty in depth. The sale, from the sheriff to him, shows that he purchased seventy arpents by forty, which were sold as the property of one Enet. Two witnesses prove that the tract of land, as purchased by Enet from an Indian, contained eighty arpents in front, commencing at bayou Maynard and running up the river; and another witness says that the seventy arpents would not reach defendant's settlement by ten arpents, it being eighty arpents, in a straight line, from bayou Maynard to defendant's settlement. There is no proof of any location of the Enet tract, twenty arpents of which the plaintiff claims to be in possession; and, on the contrary, it is shown that it has never been known, as one of the witnesses says, with any well-defined boundaries.

Plaintiff's counsel has relied particularly on the case of *Ellis vs. Prevost*, 13 *Louisiana Reports*, 230, as being a case

In a possessory action the plaintiff must show his possession by definite objects, and that he has been disturbed. Where the *locus in quo* is so uncertain that it is impossible to determine whether the defendant's possession extends or not over any part of the tract of land claimed by the plaintiff, he cannot recover.

in point ; but we have not been able to discover any analogy between the two cases ; and we are not ready to say that any of the legal principles, established by that decision, are applicable to the present case. We are of opinion that the plaintiff has not made out such case as to entitle him to recover.

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BARKER ET AL.
VS.
BANKS ET AL.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BARKER, TO USE OF ATCHAFALAYA BANK VS. BANKS ET EL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

Where the vendees and endorsers on notes, secured by mortgage, are parties to the act of sale, it is not necessary that it be *expressed* therein, that they *endorsed* the notes, to enable the vendor to proceed by the executory process.

Evidence of demand and the right to claim interest results from the protest and act of sale, when the price is for immoveable property.

The signature of a party to an act of sale is proof that he accepted the sale.

This case commenced by the executory proceeding. Barker having sold to Banks and Cammack a lot of ground in New-Orleans for ten thousand dollars, the latter gave their six promissory notes, payable at different periods, drawn and endorsed in blank by each other, and secured by mortgage on the premisses. Barker having deposited the notes with the bank as collateral security, on several of them falling due and remaining unpaid, took out an order of seizure and sale to have a portion of the mortgaged property sold for cash, and the remainder on credits to correspond with the notes not yet due. The act of sale simply expressed that the notes were drawn to the order of the payee, without stating that they

EASTERN DIST. were endorsed. The notes were all marked *ne varietur*, and
June, 1840. endorsed in blank by the payees.

BARKER ET AL.
VS.
BANKS ET AL.

The defendants appealed from the order of seizure, and assigned errors.

T. Slidell, for the appellants.

J. Barker, for the appellees.

Martin, J., delivered the opinion of the court.

The defendants are appellants from an order of seizure and sale, granted to the plaintiff, Barker, for the use of the Atchafalaya Bank, against certain property purchased by them from Barker, the vendor.

The act of sale shows that the defendants, John G. Banks and Robert C. Cammack, purchased a corner lot of ground in New-Orleans, for the sum of ten thousand dollars, payable in six instalments, for which they gave their promissory notes; each of them being alternately maker and endorser, together with a mortgage on the property. The act of sale expresses, that these notes are drawn payable *to the order of the payee*, without stating that *he endorsed* the same. The vendor (Barker) acknowledges to have received these notes after they had been marked *ne varietur* by the notary.

The defendants rely on the following assignment of errors.

1. There was no authentic evidence adduced, of the endorsement of the payees of the notes sued on, or of the costs of protest to authorize the order of seizure and sale to issue.

2. There is no authentic evidence of the demand of payment of said notes, nor of liability for interest.

3. That there is no authentic evidence of the plaintiff's acceptance of the mortgage; and generally that said order issued without sufficient authentic evidence, and is contrary to law.

Where the vendees and endorsers on notes, secured by mortgage, are parties to the act of sale, it is not necessary that it be expressed therein, that they endorsed the notes, to enable the vendor to proceed by the executory process.

I. This case is to be distinguished from that of *Dakin et al. vs. Ganahl & Co.*; 13 *Louisiana Reports*, 512; which is relied on; and is the case of *transferees* of a note and mortgage. The present is, that of the vendor against his vendees, all of whom are parties to the authentic act, on which the order

of seizure and sale issued. This document establishes that the vendees were sureties for each other, and that the security was taken in the form of endorsed notes. Admitting that the sureties did not endorse the notes, the principals are not the less liable to their vendor; for the act of sale proves that they delivered the notes to the latter as evidence of the price of the sale.

II. Evidence of demand, and of the plaintiff's right to demand interest on the notes; results from the protest, and also from the act of sale; it being for the price of immovable property.

III. The signature of the plaintiff to the act of sale, is evidence that he accepted it, with the mortgage and all the stipulations contained therein.

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BADON'S HEIRS
vs.
FOUCHER ET AL.

Evidence of demand and the right to claim interest, results from the protest and act of sale, when the price is for immovable property.

The signature of a party to an act of sale is proof that he accepted the sale.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be affirmed, with costs.

BADON'S HEIRS vs. FOUCHER ET AL.; H. BADON'S HEIRS
INTERVENORS.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH OF ST.
TAMMANY.

Where heirs sue their co-heirs for a partition of property inherited from their common ancestor, in the Probate Court, and another set of heirs intervene and claim title to one-half the property, under another and different ancestor, it involves questions of title, which must be brought before the courts of ordinary jurisdiction.

The Probate Court can inquire into the validity of sales and titles to immovable property, whenever the question arises collaterally in matters within its jurisdiction.

In a contest about the right and title to property, between two sets of heirs, claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction.

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BADON'S HEIRS

VS.

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So, where one set of heirs intervene in the Probate Court, and claim title to half the property, in an action of partition between co-heirs, inheriting from different ancestors, their petition of intervention will be dismissed for want of jurisdiction.

This is an action of partition, instituted in the Probate Court, by a portion of the heirs of the late Robert and Mariah Badon, against the defendants as purchasers from the remaining portion of said heirs, a tract of land, held by them in common. The plaintiffs allege, that their deceased father and mother were the owners of a tract of land, situated in the parish of St. Tammany, on the road from Madisonville to Covington, on the Tchefuncta river, and known as the Ferry Tract; having forty arpents in front, by forty in depth, and containing one thousand six hundred superficial arpents. The petitioners show, that Jewell, as tutor of his minor children, represents two shares in said tract of land; Wm. and J. A. Badon each own a share; and Monette M. Badon, wife of Sellers owns one-eighth of the plantation, being one share, as daughter of the deceased; that the defendant, A. Foucher, owns two shares, and P. Guesnon, one share, as purchasers from R. & E. Badon, two sons of the deceased, and from Eliza Badon, a daughter.

The plaintiffs allege, that they are desirous of effecting a partition, which must be done judicially, as some of them are minors, and it can only be made by a sale. They annex the necessary documents, authorizing them to proceed, and pray for a partition accordingly. There was no opposition by the defendants to the partition.

At this stage of the proceedings, the heirs of Henry Badon, deceased, who was a brother of Robert Badon, intervened, and claimed to be the owners of one-half the tract of land in question. They set out the original title, and allege that it was bequeathed by their grand-mother, to their father and his two brothers, Robert and Zenon Badon, to be held equally between them, and remained in the common possession of the children and heirs of Henry and Robert Badon, (Zenon having died without issue) and now continues un-

divided, as their property, they being co-proprietors and joint owners of the same: that, in right of their father, they are owners of one-half of said property, and are jointly interested in one undivided half, with the heirs of Robert Badon, the plaintiffs and defendants in this suit. They pray for leave to intervene, and be recognized as co-heirs, and have judgment for one-half of the tract of land, which they also pray may be divided.

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The plaintiffs and defendants opposed this intervention, and denied that the Court of Probates could take jurisdiction of the matters set forth therein, because they involved questions of title. They also expressly denied that the intervenors had any right or title to this property, but, on the contrary, that it belonged to, and is owned by them exclusively; and that they, and those under whom they claim, have possessed for forty years, in good faith and by just titles; wherefore, they plead the prescription of ten, twenty, and thirty years, and pray that the demand of the intervenors be rejected.

The Judge of Probates sustained the jurisdiction of the claim in intervention, and proceeded to try the whole case on the merits. From the evidence, it appeared that this tract of land was granted to Catherine Montlemat, widow of Joseph Badon, and by her bequeathed to her three sons, Robert, Henry, and Zenon Badon, in January, 1801, when she died; that Robert Badon was testamentary executor of his deceased mother's will, and curator of his two minor brothers; that he acknowledged before the Spanish tribunals, the right of his two minor brothers to one-third each, of said land; that Zenon Badon died without issue, leaving his two brothers and three sisters, his heirs; and neither of the sisters, or their heirs, are before the court. The judge divided the tract of land in contest between the two sets of heirs, of Henry and Robert Badon, and made the partition accordingly. The plaintiffs and defendants appealed.

Preston, for the plaintiffs and appellants argued on the merits, to show that the intervenors had no title, and that if

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they ever had, their claim was barred by the prescription of ten, twenty, and thirty years. This argument was made, on the supposition that the court would overrule the plea to the jurisdiction of the Court of Probates over the petition in intervention, which, he urged, could not be done consistently with the *Code of Practice*, article 921, Nos. 13, 14; *idem.*, 983; 4 *Martin, N. S.*, 510; 7 *Louisiana Reports*, 378; 2 *idem.*, 26; 3 *idem.*, 340; 8 *idem.*, 465; 11 *idem.*, 389.

Hennen, for the intervenors, insisted that the sole question to be decided here, was one of partition, and that the Probate Court has jurisdiction, although the intervenors' rights, as co-heirs, may involve a question of sale and title; but the court can decide the question of sale and title, which is only brought incidentally before it. 5 *Martin, N. S.*, 217; 6 *idem.*, 304; 7 *Louisiana Reports*, 378; *M'Caleb vs. M'Caleb*, 8 *idem.*, 459.

2. All the parties claim under a common ancestor; and the only question is, who are the co-heirs? Some of the defendants acknowledge the rights of the intervenors, and are willing to let judgment pass in their favor. On the merits, he contended that the intervenors fully made out their claim to one-half of the land. In relation to prescription, it could not run against them, for they were minors.

Morphy, J., delivered the opinion of the court.

This is an action of partition, brought by some of the heirs of the late Mariah Badon, widow of Robert Badon, against the defendants. The latter are alleged to be co-proprietors with them, of a tract of land on the Tchefuncta river, by virtue of purchases under the only other heirs of their said deceased mother, from whom the land was inherited. The heirs of Henry Badon intervened, asserting title to one-half of the tract about to be partitioned. They set forth that their grand-mother, Catherine Montlemat, widow of Joseph Badon, was the owner and possessor of said property; that, on the 3d of January, 1801, she made her last will, bequeathing the same to her three sons, Robert, Henry, and

Zenon Badon; that the land remained in the common possession of the three brothers during their life time, and continued afterwards in the possession of the children of Robert and Henry Badon, the other brother having died without issue; that they are thus interested for one undivided half of the property, of which they have never been legally divested. They pray that they may be made parties to these proceedings, and may be authorized to receive one-half of the whole tract, &c. In answer to this petition of intervention, the plaintiffs put in a plea to the jurisdiction of the court, averring that the original parties to this suit, are the true and only owners of the whole tract; and that they, and those under whom they hold, have exclusively possessed the property in good faith, and by virtue of just titles, for forty years. They pleaded the prescription of ten, twenty and thirty years, against the claim of intervenors.

The judge of the court below overruled the plea to his jurisdiction, recognized the right of the intervenors to one-half of the premises, and decreed a partition accordingly.

We think, that the plea to the jurisdiction of the Probate Court should have been sustained. The parties in this case were proceeding to a partition among themselves, of property derived from the estate of their mother, Mariah Badon, to whom it had been sold or adjudicated at the death of her husband, Robert Badon, in the year 1820; other persons step in, and assert themselves to be owners of one-half of the property which, they say, descended to them from their father, Henry Badon. It is apparent from the pleadings, that the plaintiffs and defendants in this suit, held under a title adverse to that of the intervenors; although both were originally derived from Catherine Montlemat, widow of Joseph Badon, their grand-mother. This assertion on the part of the intervenors, of their right to one-half of this property, in opposition to the exclusive ownership and possession which the heirs of Mariah Badon aver to be in themselves, for the whole of it, clearly gives rise to a question of title which, in our opinion, should have been brought before the courts of ordinary jurisdiction. We have been referred to several of

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Where heirs sue their co-heirs for a partition of property inherited from their common mother, in the Probate Court, and another set of heirs intervene and claim title to one half of the property under another and different ancestor, it involves questions of title which must be brought before the courts of ordinary jurisdiction.

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The Probate Court can inquire into the validity of sales and titles to immoveable property, whenever the question arises collaterally in matters within its jurisdiction.

In a contest about the right and title to property between two sets of heirs, claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction.

So, where one set of heirs intervene in the Probate Court, and claim title to half the property, in an action of partition between co-heirs, inheriting from a different ancestor, their petition of intervention will be dismissed for want of jurisdiction.

our decisions, in which we recognize the right of the Court of Probates to decide on the character and validity of sales of real property belonging to an estate, whenever the question arises collaterally, in matters within the jurisdiction of the court. This must be understood to apply to questions of this sort, arising among the acknowledged co-heirs of an estate, when, to ascertain the entire amount of the property to be partaken, the court before whom a suit in partition is pending, must necessarily test the validity of conveyances made to some of the heirs, when they are attacked by the other heirs. This is indispensable for the exercise of its legitimate authority, and to arrive at a correct adjustment of the rights of the parties before it. In this case, on the contrary, it is a contest between two sets of heirs, claiming under different ancestors. It is not a necessary incident of the partition, which might well have been proceeded in, and terminated without difficulty, among the original parties, but for this adverse claim of these intervenors. 4 *Martin, N. S.*, 485, *Harris, Tutor vs. M'Kee, et al.*; 8 *Louisiana Reports*, 465, *M'Caleb vs. M'Caleb*; 11 *idem.*, 389; *O'Donogan vs. Knox*; *Code of Practice*, articles 924, 983.

Had the adjudication of this property in 1820, been made to a stranger, instead of the surviving widow of Robert Badon, the present intervenors could not have brought suit against the heirs of the purchaser, in the Court of Probates. Should we permit them to set up their claims in that court, by making themselves parties to a partition pending between heirs, holding under a person from whom they do not pretend to derive title, we would allow them to do indirectly, that which they could not do directly.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; that the intervention of the heirs of Henry Badon in this suit, be dismissed, with costs in both courts; and it is further ordered, that this case be remanded to the inferior court, to be proceeded in according to law, between the original parties thereto.

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APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

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The first attaching creditor will be allowed the full amount of his judgment, in preference to others, who attach after him.

The vendor has the right to stop the goods *in transitu*, and before they reach their destination or are delivered to his vendee, on the latter becoming insolvent. This right is paramount to any lien of a third party against the purchaser.

So where goods, on their passage, are delivered to a consignee, to be forwarded to the vendee, the vendor may claim the right of stoppage *in transitu*, while they are in the hands of the agent or consignee.

If goods are delivered into the possession of a consignee, *for the purpose of conveyance to the vendee*, it is not such a constructive delivery as will deprive the creditor of his right of stoppage *in transitu*.

An attaching creditor does not acquire greater rights to the property attached than the defendant himself possesses.

4 When the owner has lost all power over his property, or has not yet acquired such power as to permit him to dispose of it, to the prejudice of others, creditors cannot attach.

So, seizing and attaching creditors cannot defeat the claim of the vendor, and deprive him of his right of stoppage *in transitu*.

An attachment can only have effect for the amount of the judgment obtained.

Attaching creditors should be paid in the order of dates of their attachments, and not *pro rata*.

This suit commenced by attachment. On the 5th October, 1830, Wm. T. Hepp instituted suit on their promissory note, against Glover & Rose, commercial partners residing in Mississippi, and attached a quantity of goods and merchandise in packages, in the hands of H. O. Ames, in New-Orleans, alleged to be the property of the defendants, or of defendant Rose, and cited Ames as garnishee.

There was a general denial pleaded in behalf of the absent defendants. The plaintiff proved his demand and had judgment against Rose for the amount of his claim, with privilege on the goods attached.

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On the 14th of November, St. John & Best instituted suit by attachment and arrest against Rose, for the sum of three thousand two hundred and fifty-five dollars, with interest and costs, due on his three promissory notes, for which they prayed judgment and privilege on the property attached. This attachment was levied on the same property as that of the plaintiffs, in the hands of H. O. Ames. There was a general denial pleaded.

These plaintiffs discontinued as to two of the notes sued on and had judgment for four hundred and eleven dollars, with privilege on the property attached.

On the 2d January, 1840, St. John & Best had a judgment which they had obtained in the United States Circuit Court of Mississippi, for the amount of their claim, which was discontinued, made *executory*, and seized the property before attached.

On the 31st January, J. & L. Brewster intervened, and alleged that they had, on the 3d September last, laded on board the ship Nashville, bound from New York to New-Orleans, nineteen boxes of hats marked and directed for F. C. Rose, Jackson, Mississippi, and consigned to H. O. Ames, of New-Orleans, agent for said ship, to be forwarded as directed. That these were goods purchased of them by Rose, but not paid for; and that he has become insolvent and unable to pay the price. They further show that St. John & Best have seized said goods and had them sold, and that various other persons have attached the same. They pray for leave to intervene and be paid in preference.

T. R. Hyde also came in for a share, by attachment, of the same goods, being the holder of two notes, on which Rose was payee and endorser; Wolfe & Clark also intervened and attached, and likewise Hyde & Goodrich; none of these had obtained judgment.

On the 19th March, 1840, a rule was taken by the plaintiff, on all the parties, to show cause why the plaintiff be not paid in full from the proceeds of the sale of the property attached; and a cross-rule was taken by St. John & Best to show cause why the judgments in their favor should not be paid in full.

There was judgment on the rule, allowing the plaintiff the full amount of his claim, as first attaching creditor ; and to St. John & Best the next, four hundred and eleven dollars, the amount of their judgment on the attachment ; dismissing the intervention of Brewster, and ordering the balance in the sheriff's hands to be held subject to the demands in intervention, in which no judgment had been rendered.

St. John & Best and J. & L. Brewster severally appealed.

Lockett and Micou, for the plaintiff and appellee.

I. W. Smith, for the appellants, St. John & Best.

Strawbridge, for Brewsters.

Simon, J., delivered the opinion of the court.

Several suits by attachment having been instituted against the defendants, and the proceeds of the sales of the property attached being in the hands of the sheriff, the plaintiff in this suit, first attaching creditor, after having obtained a judgment in his favor against the defendant, *Rose*, moved the court for an order on said sheriff, to bring said proceeds into court, together with a statement of all the interventions, attachments and seizures of all persons claiming said proceeds, to show cause why plaintiff's claim should not be paid in full, and that the attorneys of all the other attaching creditors be also notified of the rule, which order was granted.

The parties interested in the proceeds being all before the court, the judge proceeded to settle their respective rights, as in a *concurso*, and began by allowing the plaintiff in this suit the full amount of his judgment, in principal, interest and costs. He then considered the claim set up by Brewsters, intervening creditors, and gave judgment against them on their intervention. The next attaching creditors before the court, were St. John & Best, who were allowed four hundred and eleven dollars with interest and costs ; and as to T. R. Hyde, and the other attaching creditors who had not yet obtained any judgment, the judge *a quo*, being of opinion that the balance of the funds being held to respond to any judg-

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The first attaching creditor will be allowed the full amount of his judgment, in preference to others, who attach after him.

The vendor has the right to stop the goods *in transitu*, and before they reach their destination, or are delivered to his vendee, on the latter becoming insolvent. This right is paramount to any lien of a third party against the purchaser.

So, where goods, on their passage, are delivered to a consignee, to be forwarded to the vendee, the vendor may claim the right of stoppage *in transitu*, while they are in the hands of the agent or consignee.

If goods are delivered into the possession of a consignee, for the purpose of conveyance to the vendee, it is not such a constructive delivery as will deprive the creditor of his right of stoppage *in transitu*.

ment which they might obtain, and to be satisfied in the order of dates of their attachments, ordered said balance to be retained by the sheriff, to be hereafter distributed according to the rule established by the judgment. From this judgment, Brewster, St. John & Best, and Hyde & Goodrich have appealed.

We think the commercial judge did not err in allowing the plaintiff the whole amount of his judgment; he was the first attaching creditor, and his claim was fully and satisfactorily proven, not only by the judgment itself, but also by additional evidence adduced contradictorily with the other creditors.

The next question, which is relative to the right of stoppage *in transitu*, claimed by the intervenors, is not free from difficulty. Under the laws of New-York, "when the vendor sells goods on credit to another, he has the right to resume the possession of the goods, while they are in the hands of a carrier in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination he has appointed to them, on his becoming bankrupt or insolvent." 2 *Kent's Commentaries*, 540. The right exists only as between the vendor and vendee, and is paramount to any lien of a third party against the purchaser. In the present case, the goods sold by Brewsters had been shipped in New-York, on board of the ship Nashville, for Jackson, Mississippi, and were consigned to the care of H. O. Ames, of New-Orleans, to be forwarded to the defendant, who lives in the state of Mississippi. It is in evidence that the ship arrived on the first of October, 1839, and on the 4th the attachment was levied on the goods. They were mostly on board of the steam-boat when they were attached, and had not yet reached their destination. The vendee had done no act to defeat the creditor's right, as it cannot be pretended that the goods, though consigned to Ames, were, on reaching New-Orleans, placed under the orders of the vendee, and to remain stationary until he received his directions to put them again in motion for a new and ulterior destination; they were not in the possession of the consignee *for safe custody or for disposal*

on the part of the vendee, but were only delivered to him for the purpose of conveyance to the vendee, and such a constructive delivery is not sufficient to deprive the creditor of his right of stoppage. 2 *Kent's Commentaries*, 344, 345; *Smith's Law Merchant*, 196, 199. It is then perfectly clear, that at the time the goods were attached, Brewsters had not lost their right of stoppage *in transitu*, and that the circumstance of defendant's becoming insolvent before delivery of the goods to him in Mississippi, would have entitled them to exercise their right and to resume the possession of their goods.

But it is contended that the goods, having been attached, and afterwards sold under a *fi. fa.*, for the benefit of the attaching and seizing creditors, the claim set up by Brewster ought to be defeated. It has been recognized as a safe rule to adopt, that an attaching creditor does not acquire greater rights to the property attached than the defendant himself possesses, 13 *Louisiana Reports*, 570; and it has often been held by this court, that a creditor cannot attach or seize property or rights as belonging to his debtor, to the injury of third persons. Hence, it is clear that whenever the owner of the property has lost all power over it, or, as in this case, has not yet acquired such power as to permit him to dispose of it to the prejudice of others, the creditors cannot attach. 4 *Martin, N. S.*, 667; 2 *Louisiana Reports*, 514. Here, the defendant never had possession of the goods. Before delivery to the vendee, they were subject to the right of stoppage *in transitu*. The intervenors might successfully have claimed them from the defendant, as soon as his insolvency became known; and we are unable to decide that the proceedings of the attaching and seizing creditors of the defendant, ought to have the effect of depriving the intervenors of their indisputable rights. We think the judge *a quo* erred in rejecting Brewster's claim.

The claim set up by St. John & Best to a larger amount than four hundred and eleven dollars, was properly disregarded by the Commercial Court. They had originally attached the goods for the whole of their claim; but having discontinued the greatest part of their demand, and obtained

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An attaching creditor does not acquire greater rights to the property attached than the defendant himself possesses.

When the owner has lost all power over his property, or has not yet acquired such power as to permit him to dispose of it, to the prejudice of others, creditors cannot attach.

So, seizing and attaching creditors cannot defeat the claim of the vendor, and deprive him of his right of stoppage *in transitu*.

An attachment can only have effect for the amount of the judgment obtained.

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Attaching creditors should be paid in the order of dates of their attachments, and not *pro rata*.

judgment for four hundred and eleven dollars, for this sum only could their attachment have its effect. The fact of their causing the goods attached to be sold under a *fi. fa.* in another suit, cannot give them the right of being paid in preference to previous attaching creditors; and the funds proceeding from the sale under execution, properly remained in the hands of the sheriff, subject to the satisfaction of the judgments obtained on attachments previously issued.

We also concur with the judge *a quo* in the opinion that the attaching creditors ought to be paid in the order of dates of their attachment, and not *pro rata*; and we think he did not err in ordering the balance of the funds to be retained by the sheriff, and distributed, hereafter, accordingly.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court, so far as it disallows the claim set up by Brewsters, be annulled, avoided and reversed; and that the said Brewsters be allowed, and do recover, out of the funds retained by the sheriff, the sum of four hundred dollars, said sum being the proceeds of the sale of the hats by them sold to the defendant in New-York, and which were attached and sold by defendant's creditors; and it is further ordered, adjudged and decreed, that the balance of the judgment appealed from, be affirmed; the costs of appeal as between Brewsters and their appellees, being paid by said appellees; and the costs of appeal, as between St. John & Best and Hyde & Goodrich and their appellees, being paid by the appellants.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The plaintiff may join the action to annul a contract of his debtor with another person, made to cover his property, to the principal demand against such debtor.

A question of fraud is the peculiar province of the jury, and their verdict will not be disturbed, when generally supported by the testimony. Judgments of the inferior courts, founded on verdicts of juries, should never be brought before the Supreme Court, without showing that an unsuccessful attempt has been made to obtain a new trial.

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This is an action against W. H. M'Murray, on his bill of exchange drawn at Glasgow, in Kentucky, the 20th June, 1837, for one thousand dollars, on the plaintiffs in New-Orleans, and by them accepted, as is alleged, for the benefit and accommodation of the drawer. They pray judgment for the amount of said draft, and damages, &c., and that property of the defendant in the hands of A. H. Wallace & Co., be attached to satisfy said demand. The attachment was served on Wallace & Co., and they cited as garnishees.

They answered, that they were not indebted to, and had no property of William H. M'Murray, in their possession, but that there was fifty-eight hogsheads of tobacco consigned to them by John G. M'Murray, and they cannot state in whom was the right of property; that they had made advances to John G. M'Murray, on said tobacco, before the issuing of attachment, in the sum of five hundred and forty dollars, which they pray may be allowed them out of its proceeds.

The attorney appointed to defend, disclaimed all ownership, on the part of the defendant, of the property attached.

John G. M'Murray now intervened, and claimed the property. He alleges, that the interest of W. H. M'Murray in said tobacco was sold under execution in Kentucky, and purchased by him; and that in September, 1837, one Wilson obtained judgments, in Kentucky, against both him and W. H. M'Murray, for upwards of one thousand dollars; and he made an arrangement with Wilson, that John S. Page should bring the tobacco to New-Orleans, sell it, and appropriate the proceeds to the payment of these judgments. On the 4th October, 1837, Page gave a receipt for it, and was proceeding to execute his trust, when the tobacco was attached. That some of said tobacco belonged to planters,

EASTERN DIST. &c. He prays that it be delivered up to him for the purposes
June, 1840. set forth in his petition. Page also intervened, and claimed
 the tobacco to be applied in payment of the judgments of
LAMBETH AND Wilson, and alleged that a large portion of it belonged to
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The plaintiffs, in answer to the petitions of intervention, denied each and every allegation therein, and that John G. M'Murray is not the owner of the property, as is stated by him, but that the sale spoken of was pretended and fraudulent, and made to screen the property of W. H. M'Murray from his creditors. They pray that the interventions be dismissed.

Upon these pleadings and issues, the parties went to trial, and the cause was submitted to a jury.

The plaintiffs made proof of their demand, and showed that they accepted and paid defendant's draft, without having any funds of his. That the sales of the tobacco amounted to two thousand five hundred and eighty-five dollars, and that a considerable amount had been paid over to John G. M'Murray.

The intervenor, J. G. M'Murray, exhibited a mortgage from W. H. M'Murray, executed in Kentucky, in May, 1837, on this boat load of tobacco, to secure him against the payment of two notes, amounting to about one thousand dollars. There was a mass of testimony offered in behalf of the intervenors, which however failed to convince the jury; who returned a verdict for the plaintiffs, for the amount of their demand against the defendant; and they also found against the intervenors.

The counsel for the intervenors requested the court to charge the jury that the question of fraud set up in the answer to the petition of intervention, could not be legally put before the jury, with the plaintiff's demand against the defendant; that a revocatory action should have been instituted to set aside the sale and transfer of the tobacco. The court refused; but charged the jury, that the plaintiffs could join the action, to annul the contract of sale and transfer, to that they had already brought to recover their debt against

the defendant, although there was no prayer in their answer to the interventions, for annulling the transfer of the property attached.

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No motion having been made for a new trial, there was judgment for the plaintiffs, confirming the verdict, and the intervenors appealed.

C. M. Jones, for the plaintiffs.

Peyton, for the appellants.

Simon, J., delivered the opinion of the court.

Plaintiffs brought this suit to recover the sum of one thousand seventy-five dollars; they issued an attachment, which was levied on a certain number of hogsheads of tobacco consigned to Wallace & Co., by John G. M'Murray. Said Wallace & Co., made garnishees, answered the interrogatories propounded to them by plaintiffs, and show, that they had already made to John G. M'Murray, advances to a large amount, to be deducted from the proceeds of the sale of the tobacco. During the pendency of the suit, John G. M'Murray and one John S. Page, intervened to claim the tobacco, or the proceeds thereof, as their own; alleging that said tobacco had been sold by the sheriff in Kentucky, under an execution issued against the defendant; that John G. M'Murray was also interested in said tobacco for one-half; that previous to the time of the sale of the tobacco, the defendant had given his brother a mortgage on the same, to secure or indemnify him against certain security debts and liabilities, which John G. M'Murray had contracted and incurred for the defendant; that one Derastus Wilson, having obtained, in Kentucky, certain judgments against the intervenors and defendant, issued his executions which were levied on the said tobacco; and that, for the purpose of avoiding a sacrifice of the same, it was agreed between the parties that it should be sent to New-Orleans, to be there sold for the best price it could bring, and that out of the proceeds, the judgment should be discharged. They pray that the tobacco be decreed to belong to John G. M'Murray, or that

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the proceeds be paid over to the intervenors, to satisfy the judgments, and that the residue be paid over to John G. M'Murray. The plaintiffs joined issue, by alleging fraud against the intervenors, and averring that the sale spoken of, was done in order to screen the property from defendant's creditors.

The counsel appointed to represent the absent defendant, also filed his answer, and disclaimed any right of ownership to, or interest in the property attached. There was a verdict and judgment in favor of plaintiff against defendant and intervenors, and the intervenors appealed.

The intervenors appear to be dissatisfied with the charge of the judge *a quo* to the jury, in which he stated, in substance, that it was his opinion that the plaintiffs could join the action to annul the contract, to that instituted for the recovery of their demand; and that no objection having been made to the evidence introduced to prove the fraud, nor any exception taken to the answer in which the fraud is alleged, the jury were seized of the issue of fraud, as presented by the face of the pleadings. Although no bill of exceptions has been taken to the charge of the court, nor to the refusal of the judge to charge the jury, as requested by intervenors' counsel; and, although the charge of the court only appears in a statement of facts, without reserving the exceptions made by the intervenors, we feel disposed to give our opinion on the legality of the charge. We think the district judge

The plaintiff may join the action to annul a contract of his debtor with another person to cover his property, to the principal demand against such debtor.

A question of fraud is the peculiar province of the jury and their verdict will not be disturbed, when generally supported by the testimony.

did not err; it is perfectly clear that the plaintiffs may join the action to annul a contract, to the principal demand; (*Louisiana Code, 1870*), and they certainly had a right to oppose the intervenor's claim, by pleading that the contract on which they relied was fraudulent, and simulated. The question of fraud raised in this case, was one particularly of the province of a jury; and no exception having been taken to the pleadings, nor any objection made to the evidence, the jury was, undoubtedly, seized of all the issues presented to their decision.

On the merits, we are not ready to say that the verdict of the jury is so clearly erroneous as to require our interfer-

ence. The testimony adduced is contradictory; the evidence of Wilson, first taken under a commission, was introduced and read to the jury, without any objection on the part of the intervenors. It appears, also, from the answers of the garnishees to the interrogatories, and from an account of sales of the tobacco, filed in the suit, that the intervenors had already received advances above the amount of their liabilities, as shown by the testimony of Wilson, and on the whole, we think justice does not require that the verdict of the jury should be disturbed.

The intervenors did not think proper to apply to the lower court for a new trial; and we are unable to say that the district judge should have granted one, if it had been moved for; nor that he would have erred, if it had been refused. Judgments of inferior tribunals, founded on verdicts of juries, should never come before this court, without showing that an unsuccessful attempt has been made to obtain a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Judgments of the inferior courts, founded on verdicts of juries should never be brought before the Supreme Court, without showing that an unsuccessful attempt has been made to obtain a new trial.

CARTER vs. CALDWELL.

APPEAL FROM THE COMMERCIAL COURT OF NEW-ORLEANS.

In the executory proceedings on an act of sale, containing the pact *de non alienando*, against mortgaged property in the hands of the last vendee, in which *no notice* is required, the latter is not bound to call his vendor in warranty.

The intermediate vendors sell with a knowledge of the first vendor's rights to go against the property, and the consequent danger of eviction of their vendees, against which they have guaranteed.

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The intermediate vendor's obligation is to do, without notice, that which he would be bound to do if called in warranty, which is to pay the debt to the original vendor, or see it paid.

So, the last vendee, when evicted, has a right to recover from his vendor the amount he has paid, who has the same rights against his vendor.

This is an action to recover from the defendant the amount of three promissory notes, of six hundred and twenty-five dollars each, given for part of the profits of a speculation in a town lot.

The history of the case is briefly this: On the 4th May, 1836, John Slidell sold to Richard Hagan a lot of ground far back on Canal-street, for seven thousand five hundred dollars, on long credits, with special mortgage reserved, and inserting, in the act of sale, the pact *de non alienando*. On the 20th December, Hagan sells to John Caldwell, the present defendant, the same property for twelve thousand five hundred dollars, for which the latter gave his notes; relying on Hagan's paying his own notes to Slidell and releasing the mortgage. In January, 1837, Caldwell sold to R. M. Carter, for fifteen thousand dollars, who assumed to pay the notes of his vendor to Hagan, and gave his four notes, of six hundred and twenty-five dollars each, payable at different periods, for the profits of the speculation. In this sale, Caldwell guaranteed against all incumbrances, and Hagan intervened, binding himself to raise Slidell's mortgage whenever thereto required. On the 27th February, 1837, Carter sells to Thomas Duplessis, for fifteen thousand seven hundred and fifty dollars, being seven hundred and fifty dollars profit on the last sale, which was paid in cash.

Soon after the last of these sales, Slidell obtained an order of seizure and sale for the price due by Hagan, on his mortgage against the property in the hands of Duplessis, without any notice. The property was sold, under Slidell's mortgage, for six thousand eight hundred dollars. Duplessis, being evicted, came upon Carter for his seven hundred and fifty dollars which he had paid, and Carter now sues Caldwell for the amount of three of his notes for six hundred and

twenty-five dollars each, which he had paid to a third person as the holder. EASTERN DIST.
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The defendant, Caldwell, resisted the action, because Duplessis, who was evicted, had not called his vendor in warranty in the suit of eviction, in which case he might have made a valid defence.

Of this opinion was the judge presiding, and there was judgment for the defendant. The plaintiff appealed.

Benjamin, for the appellant.

Macready, contra.

Morphy, J., delivered the opinion of the court.

The following are the circumstances out of which arose the controversy now submitted for our decision. On the 4th of May, 1836, J. Slidell sold to Richard Hagan a lot of ground on Canal-street, for seven thousand five hundred dollars, which he received in three promissory notes of two thousand five hundred dollars each, secured by special mortgage on the premises sold; on the 20th December, 1836, Hagan sold the property to Caldwell for twelve thousand five hundred dollars; the purchaser gave his notes for the full price, and relied on his vendor's engagement to pay off the mortgage standing in favor of Slidell; on the 14th February, 1837, Caldwell sold to Carter for fifteen thousand dollars: the latter assumed to pay Caldwell's notes to Hagan for twelve thousand five hundred dollars, and subscribed to him four notes of six hundred and twenty-five dollars each, for the balance. Caldwell gave a full guarantee against all incumbrances, and Hagan intervened in the act of sale binding himself to have the mortgage to Slidell raised, whenever Carter may dispose of the property, and the purchaser thereof shall require the same to be raised before accepting the sale, or at any time when Carter himself may require such mortgage to be raised. On the 27th of February, 1837, Carter sold to T. Duplessis, for fifteen thousand seven hundred and fifty dollars, the latter paying in cash seven hundred and fifty dollars, and assuming to pay Carter's notes to Caldwell for two thousand five hun-

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dred dollars, and the notes of the latter to Hagan for twelve thousand five hundred dollars, which Carter had undertaken to pay in his discharge. On the 26th of May, 1838, Slidell sued out a writ of seizure and sale on one of Hagan's notes for the price; the property brought at the sheriff's sale six thousand eight hundred dollars.

This suit is brought to recover back from defendant the amount of three of the negotiable notes of six hundred and twenty-five dollars each, which plaintiff had given him, on the ground that plaintiff's vendee, having been evicted by reason of an incumbrance guaranteed against by defendant, had in consequence thereof refused to pay said notes, and that plaintiff had been compelled to pay them to third holders. The judge of the court below was of opinion that the plaintiff had no right to recover, and gave judgment for the defendant; the plaintiff appealed.

The opinion of the judge *à quo* is predicated mainly on the ground that Caldwell was not notified of the proceedings against Carter's vendee, which resulted in his eviction; that had he been called in warranty, he could have prevented the eviction by paying off the mortgage to Slidell. We are of opinion that the proceedings by which the plaintiff's vendee was evicted, did not constitute a suit against Duplessis, wherein he was bound to call his vendor in warranty; but it was an *executory process* against Hagan, the original mortgagor, wherein no notice is required by law to any subsequent party. The mortgage held by Slidell was one containing the pact *de non alienando*; he seized the property as if yet in the hands of his purchaser, Hagan. It is well settled, that the mortgagee is, by virtue of such *pact*, entitled to seize the property, as though no alienation had taken place, *i. e.* against the original mortgagor without any notice to the third possessor. Caldwell must have known the nature of the incumbrance against which he guaranteed the plaintiff, *viz.*: a mortgage by which the plaintiff and his assigns were exposed to be evicted without any notice being required by law to be given to them or to himself. This danger he knew to exist; against it he guaranteed, and cannot now complain

In the executory proceedings on an act of sale, containing the pact *de non alienando*, against mortgaged property in the hands of the last vendee, in which no notice is required, he is not bound to call his vendor in warranty.

The intermediate vendors sell with a knowledge of the first vendor's rights to go against the property, and the consequent danger of eviction of their vendees, against which they have guaranteed.

that notice of Slidell's proceedings was not given him, when he knew that he was entitled to none, and when the plaintiff received none himself. Defendant's obligation then was to do, without notice, what he would have been bound to do, if called in warranty, in an hypothecary action brought against his vendee, *i. e.*, *pay the debt, or see it paid by Hagan*; the property being taken away from the plaintiff's vendee in consequence of defendant's failure to comply with this obligation, the consideration for which the plaintiff gave his notes has failed, and he has a right to recover back of defendant any portion of the price he has paid; and the defendant has the same rights against his vendor, R. Hagan.

It has been contended that Hagan's direct engagement to the plaintiff, to raise this mortgage when required by him to do so, had done away with the defendant's guarantee, or, at least, had imposed on the plaintiff the obligation of calling on Hagan to pay off this mortgage, which plaintiff had failed to do. The object for which Hagan consented to enter into this agreement, is too obvious for us to admit of any such construction. The outstanding notes of Hagan secured by the mortgage, had a long time to run, and might have prevented the resale of the property. To obviate this difficulty, and for this sole purpose, we apprehend, Hagan bound himself to raise the mortgage, if required to do so by the plaintiff or his vendee; and in like manner, we find him appearing in the sale of Carter to Duplessis, and contracting the same obligation. Duplessis having been satisfied with this renewed engagement on the part of Hagan, and consenting to take the property with the incumbrance, the plaintiff had no occasion to call in Hagan to raise the mortgage, before the maturity of his notes; when they became due, it was not his business, but that of the holder, to call on the maker for payment. If he knew of their dishonor, which is not in evidence, he might have remained quiet, relying on the defendant's guarantee to him, which he had no reason to consider as impaired or weakened by the facility which Hagan consented to give him, in case he resold the property.

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The intermediate vendor's obligation is to do, without notice, that which he would be bound to do if called in warranty, which is to pay the debt of the original vendor, or see it paid.

So, the last vendee, when evicted, has a right to recover from his vendor the amount he has paid, who has the same rights against his vendor.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Commercial Court be avoided and reversed; and, proceeding to give such judgment as, in our opinion, should have been rendered below, it is ordered, adjudged and decreed, that plaintiff do recover of defendant, the amount of the three notes mentioned in the petition, to wit: eighteen hundred and seventy-five dollars, with legal interest from the respective periods of maturity of said notes, together with costs in both courts.

FREEMAN, F. M. C. vs. WATTS, SHERIFF, &C.

APPEAL FROM THE COURT OF THE EIGHTH JUDICIAL DISTRICT, FOR THE PARISH OF LIVINGSTON, JUDGE JONES, OF THE DISTRICT, PRESIDING.

The sheriff is without authority to seize and sell immoveable property or slaves, under execution issuing from the court of a justice of the peace, when the sum to be made, is *less* than fifty dollars.

The fact of the defendant in the execution, pointing out immoveable property, will not authorize the sheriff to sell, though it may to distrain and hire, or farm it out.

This suit commenced by injunction. The plaintiff alleges, that he is the owner of a lot of ground in the town of Springfield, in the parish of Livingston, which he alleges the defendant, as sheriff of said parish, has illegally seized under an execution from a justice's court, for twenty-five dollars against him, and which he positively asserts issued without any legal authority. He prays for an injunction against the sheriff, who he demands, may be perpetually enjoined from proceeding any further.

The defendant pleaded a general denial, and prayed that the injunction be dissolved, with damages.

It appears from the evidence that one Shieler obtained a judgment before one of the justices of the peace, against

Freeman, for twenty-five dollars and costs, on the 17th May, 1837. An appeal was taken to the Parish Court the 1st of June following, and was dismissed by consent, in consequence of some arrangement. Execution, however, issued the 31st August following, in virtue of which the lot of ground mentioned was seized.

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There was judgment dismissing the injunction, and the plaintiff appealed.

Curry, representing the defendant and appellee, made the following points :

1. The injunction was dismissed. The only error is, that it should have been *dissolved*, with full interest and damages, according to the act of 1831.

2. The evidence shows that the execution issued properly, for although it was attempted to be shown that the judgment was paid in part and settled, yet it is evident it remained unsatisfied ; therefore, the lot was legally seized, and nothing short of actual payment could stop the sale.

3. The injunction was wrongfully obtained, in every respect. Even if there had been good grounds, the plaintiff in execution (Shipler) should have been made a party with the sheriff.

No counsel appeared for the plaintiff.

Simon, J., delivered the opinion of the court.

Plaintiff alleges, that he is the owner of a lot of ground in the town of Springfield, which has been illegally seized, and is on the eve of being sold by defendant, as sheriff of the parish of Livingston, on an execution issued against him from a justice's court, for twenty-five dollars. He asserts that the writ issued without any legal authority, there being no judgment on which the same could be predicated ; and he prays for an injunction, for five hundred dollars damages, and for general relief.

The District Court dissolved the injunction, gave judgment against plaintiff for costs ; from which judgment he appealed.

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The proceedings had before the magistrate were produced in evidence, and show that a judgment was obtained for twenty-five dollars and costs, against the present plaintiff. An appeal was taken to the Parish Court, and dismissed by consent. The return of the sheriff, who is the only defendant in this suit, shows that he seized the lot of ground in question, by virtue of an execution issued on said judgment. We are of opinion that, although the defendant has shown the judgment and execution by virtue of which he acted, he has not shown enough to satisfy us that he was legally authorized to sell the property which he had seized; and we think, also, that although the plaintiff has, in his petition, limited his allegations to a want of authority in the defendant, as resulting from the absence of a judgment, we ought not to permit the sheriff to sell the property, if, from the law itself, it is clear he has no such authority.

According to articles 1140, 1144 and 1145, of the Code of Practice, a judgment rendered by a justice of the peace, if no moveable property be found to satisfy it, cannot be made out of the sale of the slaves and real property belonging to the debtor; but such slaves and immoveable property are to be distrained, and hired or farmed under the direction of the magistrate, for a sufficient amount to pay the creditor's judgment. The only exceptions to this rule are, when the judgment amounts to fifty dollars, or upwards, in principal, interest and costs, or when several creditors have obtained judgments, which, together, would exceed that sum. *Code of Practice, articles 1146 and 1147.* In this case, the judgment to be satisfied in principal, interest and costs, does not amount to fifty dollars; and the defendant had, therefore, no authority to sell the lot. We do not think that the fact of the plaintiff's pointing out said lot to the sheriff, though perhaps sufficient to authorize him to distrain it, without previously attempting to seize and sell moveable property, could permit him to sell it. The district judge erred in dissolving the injunction.

The sheriff is without authority to seize and sell immoveable property or slaves, under execution issuing from the court of a justice of the peace, when the sum to be made is less than fifty dollars.

The fact of the defendant in the execution pointing out immoveable property, will not authorize the sheriff to sell, though it may to distrain and hire or farm it out.

It is, therefore, ordered, adjudged and decreed, that the

judgment of the District Court be annulled, avoided and reversed, and that the injunction be made perpetual, with costs in both courts.

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BERT, F. P. C.,
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GOULE & LAMBERT, F. P. C. vs. VIDAL ET AL., F. P. C.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

Where a case presents merely a question of fact, the judge *a quo*, who heard the witnesses and saw the manner they testified, is more competent to judge of the degree of credibility to be given to their testimony, than this court, and his judgment in doubtful cases should be affirmed.

This is an action against Merced Vidal, f. w. c. as principal, and M. Debergue, f. m. c. as surety on a merchant's account. The plaintiffs annex their account for three hundred and sixty-six dollars and twenty-nine cents, and pray judgment against the defendants, *in solido*, for the amount thereof. The defendants severed in their answers. Vidal avers, she was to have been allowed twelve months credit, and if, at the end of that time, she was unable to pay, the plaintiffs were to take her note at ninety days. That this term has not yet expired, and the plaintiffs have no right of action.

Debergue says, he went to the plaintiffs to ascertain if they would give his co-defendant the same credit and time, as they allowed to him, to wit., twelve months, and take a note at ninety days, if not convenient to pay, to which they assented. He expressly denies having bound himself for her to the plaintiffs in any way. The plaintiffs' clerk swore positively that the defendants were both at the store together, and that the goods were sold expressly on the condition that Debergue should be security for Vidal; and that he had directions from Lambert, one of the plaintiffs, not to deliver the goods, except on an order from Michel Debergue, or from him personally.

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Debergue's witness swore as positively, that he was with the defendants in plaintiffs' store, and Lambert told Vidal that she could take goods payable at one year's credit. There was no question about Debergue's becoming her surety. He did not say if she could not pay, he would pay for the goods she took, and he did not tell Lambert to deliver the goods to her on his account, &c.

The judge presiding, notwithstanding the contradictions in the statements of the witnesses, was of opinion the plaintiff should recover against both defendants. Judgment was rendered accordingly, and Debergue appealed.

Preaux, for the plaintiffs and appellees.

Bodin, contra.

Simon, J., delivered the opinion of the court.

One of the defendants, sued as the surety of the other, denies expressly to have ever bound himself as such security; the claim is founded on an account of goods and merchandize, the amount of which is admitted. There was judgment in the court below against both defendants, and the surety appealed.

This case presents merely a question of fact, and although there appears to be some contradiction in the evidence, we are not prepared to say that the plaintiff's witness ought not to be believed, and that the parish judge who heard both witnesses, who saw the manner in which they testified, and who is more competent than we are to judge of the degree of credibility to be placed in their testimony, erred in giving judgment in favor of the plaintiff.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Parish Court be affirmed, with costs.

COMSTOCK ET AL. VS. PAIE.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

COMSTOCK ET AL.
VS.
PAIE.

An appeal lies from an order or judgment authorizing the plaintiff to bond goods or property of the defendant, which has been sequestered.

The defendant may bond his property, but the plaintiff is never allowed the possession of it. He can only demand that it be sold, if it be of a perishable nature.

This is an action against the defendant, and one Smith, for seven hundred and twenty-eight dollars, the price of one hundred and four barrels of flour, which the plaintiffs allege they sold and delivered to said defendant. They pray for judgment, and that the flour be sequestered, and held subject to their demand.

The defendant denied, generally and specially, every allegation and fact set forth in the petition.

The defendant's counsel, on suggesting to the court that the plaintiffs had obtained possession of the flour from the sheriff, and sold it, took a rule on the plaintiffs and sheriff, to show cause why the flour, or the proceeds thereof, should not be delivered up to the defendant, on his giving bond for its forthcoming. The rule was made absolute, as regards the plaintiffs.

The bond furnished by defendant was signed and delivered to his counsel in blank, who filled it up for a sum less than that claimed, and received the money from the sheriff.

The plaintiffs then took a rule on the sheriff and defendant, to show cause why the sheriff should not be held responsible for taking an insufficient bond; and why the plaintiffs should not be allowed to bond the proceeds of the flour.

On the trial of this rule, it was determined that the authority from defendant to his attorney, to give the bond, was not sufficient, the rule was made absolute, and ordered that the plaintiffs be allowed to bond the property sequestered. From this order the defendant appealed.

Clark and Eggleston, for the plaintiffs.

Bartlette, for the appellant.

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VS.

FAIR.

Martin, J., delivered the opinion of the court.

The defendant is appellant from the judgment of the District Court, making a rule absolute, which made the sheriff responsible for taking an illegal and insufficient bond on an order of court, allowing the defendant to bond the proceeds of a quantity of flour sequestered by the plaintiffs, *and also in allowing the plaintiffs* to bond the same.

The first part of the rule, which relates to the sheriff, cannot be considered by us, because the defendant and appellant is without interest therein; and the sheriff is not before us, either as appellant or appellee.

An appeal lies from an order or judgment authorizing the plaintiff to bond goods or property of the defendant which has been sequestered.

It is objected, as to the second part, that it works no irreparable injury; and is not, therefore, an appealable case. We are of opinion that if the property was delivered to the plaintiffs on their bond, the defendant must suffer an injury, which a final judgment in the court below, or ours on an appeal, could not repair; for neither judgment could relieve the defendant, who would be compelled to seek relief in a separate suit on the bond.

The defendant may bond his property; but the plaintiff is never allowed the possession of it. He can only demand that it be sold, if it be of a perishable nature.

The object of a sequestration is to secure to the plaintiff a right which he claims on the defendant's property. The latter may obtain the restoration of his property by substituting thereto a bond, with security for indemnification of the plaintiff, in case of the removal of the property. The plaintiff is never allowed to demand the possession of the property itself. If it be of a perishable nature, he may, however, demand that it be sold and the proceeds deposited in court; unless in the meantime the defendant exercises his right of bonding it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as it authorizes the plaintiffs to bond the property, or its proceeds sequestered, be annulled, avoided and reversed; and that the rule be in this part discharged; the plaintiffs and appellees paying the costs of the appeal, and those of the rule.

SHORT vs. KNIGHT.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

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When there is no written evidence of the auctioneer's authority to sell, or the owner's assent, and the *proces verbal* is made out three or four years afterwards by the clerk of the auctioneer, acting as his attorney in fact, it is insufficient to compel a compliance on the part of the owner of the property.

A tender of the notes or money to a notary not designated to draw up the act of sale, is insufficient to compel the owner to make a title, in compliance with an adjudication.

This is an action to compel the defendant to perfect a sale, and make a title, to a certain lot of ground in New-Orleans, alleged to have been sold at auction, and bid off by the plaintiff for two hundred and seventy dollars, the 15th of January, 1830.

The plaintiff instituted this suit the 15th of April, 1834, to compel a compliance, on the part of the defendant, with the adjudication. He alleges, that he executed an act of sale, and gave his three several notes, for ninety dollars each, endorsed, and payable in one, two and three years, according to the terms of sale, and deposited them with G. R. Stringer, then a notary, and has since deposited the money for the entire price, with F. Grima, the successor of Stringer, but that the defendant has refused, and declines it. He prays that the lot may be decreed to belong to him, and that he have judgment for damages. The defendant, since the alleged adjudication of the lot in question, left the state, and a curator *ad hoc* was appointed to defend, who pleaded a general denial.

The plaintiff produced a certificate of the auctioneer's clerk, made out four years after the date of the adjudication, and signed by the clerk as attorney in fact of the auctioneer, who states, in his testimony, that it was made out by his authority. The auctioneer herein certifies, that on the 15th January, 1830, he sold to Samuel Short, by order of Simeon Knight, at public auction, a lot of ground, for two hundred and seventy dollars, on a credit of one, two and three years,

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for his endorsed notes, secured by mortgage. The plaintiff produced the act of sale, which he tendered, and also proved the tender of the notes and money. The act is dated the 15th February, a month after the adjudication, and the money was tendered a long time afterwards. Knight refused, because Short had not complied with the terms of sale.

The district judge was of opinion the certificate of the auctioneer was insufficient, and that the plaintiff had neglected for too long a time to comply, and to procure his title. There was judgment for the defendant, and the plaintiff appealed.

Preston, for the plaintiff.

Elwyn, contra.

Martin, J., delivered the opinion of the court.

The plaintiff is appellant from a judgment which rejects his demand on the defendant to make him a title to a lot, adjudicated to him at an auction sale of the plaintiff, as the highest bidder.

The auctioneer testified that he sold the lot in question, by order of the defendant, as stated in the *proces verbal* of the sale, as made out by his clerk. This document states that the lot was sold at public auction, by order of Simeon Knight, on the 15th January, 1830, on a credit of one, two and three years.

When there is no written evidence of the auctioneer's authority to sell, or the owner's assent, and the *proces verbal* is made out three or four years afterwards by the clerk of the auctioneer, acting as his attorney in fact, it is insufficient to compel a compliance on the part of the owner of the property.

It appears to us, that the District Court did not err. There is no written evidence of any authority given by the defendant to the auctioneer to sell the lot, or of his subsequent assent thereto. What is presented to us as the auctioneer's certificate, cannot be viewed as the legal document of which the law speaks. It was made out four years after the sale, by a person who informs us he acts for, and as the attorney in fact of the auctioneer, who testifies that it was given by his authority. We agree with the district judge that this certificate, given four years after the adjudication, when all the instalments were due and payable, and when, therefore, the terms of the sale could no longer be complied with ;

stating what passed at the sale, from memory, without reference to the auctioneer's book, ought to be disregarded. EASTERN DIST.
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There is no evidence of any attempt to comply with the conditions of the sale by giving endorsed notes, except by a call on a *notary*, who does not appear to have been designated or authorized by the defendant to draw up the act, or receive the notes or money. It is true it appears from the evidence, that after all the instalments were due, the money was left with the successor of the first notary employed to draw up the act of sale, and by him tendered to the defendant, who declined to receive it. This, in our opinion, he correctly did; for it might have been convenient to sell for notes at one, two and three years, and otherwise to sell for cash, when the opportunity he had to use the notes, was past.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A judgment which is reversed by the Supreme Court, and remanded for a trial *de novo*, does not settle the rights of the parties and form *res judicata*.

The assignment of a *part of a debt* will be enforced in the courts of chancery, and by the courts in this state, where the obligation resulting from the assignment of a part of the debt may be implied from the custom of trade, or course of business between the parties.

The courts of this state will enforce an equitable right arising in another state, when the remedy is sought here.

Prescription is interrupted by a suit in the United States Court, sitting in another state.

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A tender of the notes or money to a notary not designated to draw up the act of sale, is insufficient to compel the owner to make a title in compliance with an adjudication.

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This is an action for the sum of two thousand four hundred dollars, being part of the proceeds of a shipment of tobacco, made by Thomas H. Fletcher, of Nashville, to the defendants in Baltimore, and this sum by him assigned to the plaintiff. The facts of the case are these :

"The defendants, Luke Tiernan & Sons, of Baltimore, were factors of T. H. Fletcher, of Nashville, Tennessee. In the course of their business transactions, Fletcher became indebted to them, and to another house, in which Luke Tiernan was surviving partner, in a sum of money exceeding nine thousand dollars. On the 8th of May, 1819, Fletcher, through his agent, Jouett F. Fletcher, shipped at New-Orleans, eighty-one hogsheads of tobacco, on board of the brig Struggle, bound for Baltimore, consigned to Tiernan & Sons. The invoice and bill of lading were enclosed in a letter of advice to Tiernan & Sons, by the Struggle. In the invoice, it was stated that the shipment was made by order of Thomas H. Fletcher, through his agent Jouett F. Fletcher ; and in the bill of lading, that it was for the account and risk of Thomas H. Fletcher, and consigned to Tiernan & Sons."

"A short time before, there had been a like shipment of tobacco, on account of Thomas H. Fletcher, to Tiernan & Sons, by the schooner Mary. The consignment by the Struggle, arrived on the 7th of June, 1819, sometime after that by the Mary had been received. Previous to the arrival of either of these shipments, viz. on the 10th of April, 1819, Thomas H. Fletcher, at Nashville, wrote a letter to Tiernan & Sons, enclosing another to his creditors at Baltimore, informing them of his embarrassments, in consequence of the failure of a house at Nashville, and offering a proposition for the liquidation of their debts. The letter, among other things, stated that his cotton and tobacco at New-Orleans had all been shipped, and advances had on it, and that he had received the money arising from the sales and shipments ; that he held a large amount of good paper of the most unquestionable kind, the greater part of which was then due ; that he offered to give paper of this description

for their claims against him. He then proposed, that the creditors should appoint Mr. Ephraim H. Foster, of Nashville, their agent, to negotiate the business; and added, 'in all cases such of you as hold my notes must forward them to Mr. Foster, as they must be taken up when I give him other paper.' Tiernan & Sons, on the same day they received the letter, accepted the proposition, and wrote a letter to that effect. In consequence of this arrangement, Thomas H. Fletcher, on the 21st of May, 1819, paid to Mr. Foster, in promissory notes, the claims of the two houses of the Tiernans, and took receipts in full from Mr. Foster, as agent. At the time of this payment and settlement, Tiernan & Sons did not know of the consignment by the Struggle; but Mr. Charles Tiernan arrived at Nashville, shortly afterwards, and expressed his satisfaction at the mode of payment. At a subsequent period, in July, 1819, this payment and settlement were rescinded by the parties, and the receipts given up.

"On the 21st of May, 1819, Thomas H. Fletcher, being indebted to James Jackson, of Nashville, (the plaintiff,) drew a bill of exchange in his favor upon Tiernan & Sons, as follows: 'Nashville, May 21st, 1819. \$2400. Sixty days after sight of this my first of exchange, second unpaid, pay to the order of James Jackson, twenty-four hundred dollars, value received. Thomas H. Fletcher. To Messrs. Luke Tiernan & Sons, Baltimore.' This bill was presented and protested for non-acceptance, on the 9th of June, 1819; and was at maturity protested for non-payment. On the same day, the bill was drawn, Fletcher drew the following assignment on the back of a duplicate invoice of the shipment by the Struggle. 'Nashville, 21st of May, 1819. I assign to James Jackson so much of the proceeds of the sale of the tobacco alluded to in the within invoice, as will amount to twenty-four hundred dollars; to Ingram & Loyd, as above, six hundred dollars; and the balance, whatever it may be, to G. G. Washington & Co.; and Messrs. Tiernan & Sons will hold the net proceeds of the within invoice subject to the order of the persons above named, as directed

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above. Thomas H. Fletcher.' This assignment was not delivered to Mr. Jackson until the 26th of the same month ; and all persons named therein were creditors of Fletcher."

This case has been litigated in the United States Courts, and a decision adverse to the pretensions of the present plaintiff, was given in the Supreme Court of the United States, in January, 1831. 5 *Peters*, 580. This was a suit at law. The Supreme Court said that he could not recover at law, "whatever might be the case in a suit in equity, brought by the plaintiff to enforce his equitable claims under his assignment."

The present suit was instituted in January, 1838, one of the defendants being in New-Orleans and arrested.

The district judge was of opinion the plaintiff was entitled to recover on his assignment, and gave judgment against the defendants *in solido*, and they appealed.

Ehryn, for the plaintiff and appellee, insisted that the judgment should be amended so as to allow interest on the demand, from the time the defendants were in funds.

Strawbridge, for the defendants, contended that the assignee of a part of a debt, which assignment not having been accepted by the debtor, could not recover. He controverted the passage in 2 *Story's Equity Jurisprudence*, number 1044 ; and also commented on the case of *Mandeville vs. Welsh*, 5 *Wheaton*, 286. See also 5 *Peters*, 393-4.

2. If the assignment did not give Jackson such a title under the laws of Maryland, where it was to be executed and consummated ; or rather if the decree of the Supreme Court of the United States deprived him of the right to sue in his own name, the plea of *res judicata* must prevail, and our courts cannot give him a better remedy or title. *Story's Conflict of Laws*, number 565, 566.

3. But it is said the difficulty is only as to the remedy, not the right or title to the claim ; and that the remedy must be by the laws of Louisiana. If they are to govern, the plaintiff

is no better off, for our laws expressly prohibit the splitting up of debts. *Louisiana Code*, 2149; *Pothier on Obligations*, numbers 358, 498. EASTERN DIST.
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Eustis, for the plaintiff, maintained:

1. The right of the plaintiff to his remedy in equity on the assignment, will be found to be unquestionable.

"If A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity, to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of the assignment of a part of such debt." *2d Story's Equity*, section 1044, p. 308.

In support of this rule in equity, the very case of *Jackson vs. Tiernan*, 5 *Peters* 598, is cited, together with other authorities. See *Pardessus, Droit Commercial*, vol. 2, sections 328 and 313.

Martin, J., delivered the opinion of the court.

This is an action to recover the sum of two thousand four hundred dollars, with six per cent. interest per annum, according to the laws of Maryland, on an assignment, for a valuable consideration, by one Thomas H. Fletcher, to the plaintiff of this sum, to be paid by the defendants, from so much of the proceeds of a shipment of tobacco made to them by Fletcher, who was indebted to the plaintiff. The latter took this assignment without any other security, against a protested bill of exchange, for the same amount, on being shown the receipts of the agent of the defendants, that Fletcher owed them nothing, and that the consignment of tobacco had actually been made. The assignment was made on the 21st of May, 1819, at Nashville, and the defendants resided in Baltimore. The defendants never consented to the payment of the sum thus assigned, and a suit at law was commenced in the Circuit Court of the United States, for the District of Maryland, by the present plaintiff, against the present defendants; and finally determined in the Supreme Court of the United States, at the January

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term, 1831, adversely to the pretensions of the plaintiff; but the case was remanded for a *venire facias de novo*. See the case in 5 *Peters*, 580 to 601. The facts of the case reported there, are made evidence in this, by an agreement of record.

The defendants, one of them being arrested in New-Orleans, pleaded the general issue and prescription; and averred, that the matters and things alleged in the petition, were adjudged and decided in the suit between the same parties, in the Supreme Court of the United States.

There was judgment for the plaintiff, and the defendants appealed.

The case before us presents four points, or questions, for the solution of this court, as follows:

1. Whether the defendants could legally apply the proceeds of the tobacco, to the discharge of their claim on the assignor?

2. Whether the judgment of the Supreme Court of the United States forms *res judicata*, or not?

3. Whether the assignment could be enforced in the Court of Chancery in Maryland; and, if so, whether it must be enforced here?

4. Whether the plaintiff's action is barred by prescription?

I. It is clear that the defendant's claim on Fletcher, had been settled before the shipment of the tobacco, and he had their receipt therefor, which he showed to the plaintiff at the time of the assignment. The defendants could not, therefore, apply the proceeds of the tobacco to the payment of this claim.

II. The judgment of the Circuit Court of the United States for the District of Maryland, was reversed by the Supreme Court, and cannot, therefore, form *res judicata*; and if it had not been reversed, it could not have availed the defendants, for it was against them, and gave to the plaintiff what he claimed. The judgment of the Supreme Court of the United States, remanding the case for a *venire facias de novo*, does not settle the rights of the parties. It is still open for further litigation.

A judgment which is reversed by the Supreme Court and remanded for a trial *de novo*, does not settle the rights of the parties and form *res judicata*.

III. The counsel for the plaintiff has shown that although the assignment of a debt would be disregarded by, or rather would not be enforced in the common law courts of the state of Maryland, which is the *locus solutionis*, yet the assignment even of a part of a debt would be enforced in the Courts of Chancery in that state: provided the debtor assented thereto; or an obligation, resulting from the assignment of a part of the debt may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. As for example, the deposit of money in a bank; the proceeds of a crop sent by a planter to his commission merchant for sale; or those of a shipment of produce to a consignee or factor in Baltimore, Liverpool or Havre, which is the present case. See the case of *Poydras vs. Delamare et al.*, 13 Louisiana Reports, 98; *Mandeville vs. Welch*, 5 Wheaton, 277. See also 2 Story's *Equity Jurisprudence*, section 1044; 3 Swanston's Reports, 393; *Tiernan vs. Jackson*, 5 Peters, 598.

The plaintiff had, therefore, an equitable right, on this assignment, in the state of Maryland. The courts of this state are bound to enforce equitable rights. These rights are to be tested by the *lex loci contractus*, though the remedy here must be sought according to our laws, to wit, the *lex fori*.

IV. The last question is the plea of prescription. The facts show that the assignment was made by Fletcher to Jackson in May, 1819; and suit was commenced in the Circuit Court of the United States for the District of Maryland, in April 1824, and remanded by the Supreme Court of the United States, at its January term, 1831. The suit does not appear to have ever been discontinued, and for aught that we know, may be still pending in that court. The plea of prescription cannot, therefore, avail the defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The assignment of a part of a debt will be enforced in the courts of chancery, and by the courts in this state, where the obligation resulting from the assignment of a part of the debt may be implied from the custom of trade, or course of business between the parties.

The courts of this state will enforce an equitable right arising in another state, when the remedy is sought here.

Prescription is interrupted by a suit in the United States Court, sitting in another state.

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CHILDRESS, ADMINISTRATOR, ETC. VS. DAVIS AND WEBB.

CHILDRESS,

ADM'R. ETC.

VS.

DAVIS & WEBB.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, FOR THE PARISH OF ST. HELENA, JUDGE JONES, OF THE DISTRICT, PRESIDING.

A person suing as administrator may, if the evidence shows it, recover the sum claimed, in his own individual right.

The plaintiff sues as administrator of Jacob Smith, deceased, to recover from the defendants the sum of one thousand one hundred and one dollars, the price of a tract of land adjudicated to G. Davis, at the probate sale of Smith's estate, in September, 1836, who gave Thomas Webb as his surety. He alleges, that he was appointed administrator while a resident of the parish of St. Helena, but that he now resides in the parish of St. Tammany. He prays judgment against the defendants, *in solido*.

The defendants denied that the plaintiff was administrator of Jacob Smith's estate, which they aver was a vacant estate, and could only be administered by a curator, and that one had been appointed. Various other matters were pleaded, but no proof of them made on the trial.

It seems that, soon after Smith's succession was opened, one B. Spellar was appointed curator; and that in January following, he presented his account and prayed to be discharged, and which was homologated, without opposition, in the ensuing August. Before the discharge of the curator, the plaintiff was appointed administrator, the 20th June, 1837. He rendered his account on the 19th November, 1838. In the meantime the heirs of Smith appeared, were recognized, and sold and conveyed all their right and interest in his succession, to one G. T. Raoul, for five thousand dollars, by public and authentic act, the 14th March, 1837; who sold and conveyed the same to Paris Childress, the plaintiff, for the same sum, by notarial act, the 27th April, 1837; and at a special Probate Court, held for the parish of St. Helena, the 13th September, 1838, said property was confirmed to P. Childress, as the true and lawful owner

thereof. This suit was instituted 6th April, 1838; so that Childress was both administrator and proprietor of Jacob Smith's succession, at the time of bringing suit. There was judgment in his favor, and the defendants appealed.

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Hennen, for the plaintiff, insisted on the affirmance of the judgment, with ten per cent. damages, and costs.

No counsel appeared for the appellants.

Morphy, J., delivered the opinion of the court.

This suit is brought to recover the price of a lot of ground, purchased by Goodwin Davis, at the sale of the estate of Jacob Smith, and for the payment of which, Thomas Webb had obligated himself as surety. The defendants, among divers matters of defence set up in their answer, but not attempted to be made out on the trial, pleaded that plaintiff could not recover as administrator, because the estate of Jacob Smith was a vacant estate, and could be represented only by a curator; that said vacant succession was under the management of a curator at the time, and more than three months after the plaintiff's public appointment as administrator; that the estate of Jacob Smith had been taken from the custody and control of plaintiff, by an order of the Court of Probates, and delivered up to certain individuals claiming to be the heirs of the deceased; that if plaintiff had ever been legally appointed administrator, he was without power to sue, or do any other act in the said capacity, having rendered his accounts as such. There was judgment for the plaintiff, and defendants appealed.

The evidence adduced by defendants, if it shows, as they contend, that the plaintiff is without capacity to sue as administrator, establishes, at the same time, that he purchased all the rights of the legal heirs of Jacob Smith, and that he is, therefore, entitled to the sum claimed in his own right. Although he has sued for it as administrator, nothing should prevent him from recovering the money due to him individually. 2 *Martin, N. S.*, 17, *McGreer vs. Browder*; 10 *Martin*, 464.

A person suing as administrator, may, if the evidence shows it, recover the sum claimed, in his own individual right.

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The appellee prays for damages for the frivolous appeal; we think him entitled to them.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs, and five per cent. damages.

CAIN vs. MORRIS.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, FOR THE PARISH
OF ST. HELENA, JUDGE JONES, OF THE DISTRICT, PRESIDING.

The maker of a note cannot object to the insufficiency of the protest, because whether the note is protested or not, does not increase his liability.

Protest is necessary to give interest, when none is stipulated, and is good to prove a demand, if specially denied.

This is an action against the maker of a note. Mercer confessed judgment, and Morris, the other maker sued, made defence. He objected to the protest being offered in evidence, on the ground that it was not signed by the witnesses, or recorded. The protest was made in the usual way, in the *presence* of two witnesses, and the original annexed to the petition. There was judgment for the plaintiff, and the defendant appealed.

Curry, for the plaintiff, insisted on the affirmance of the judgment, with damages, as for a frivolous appeal.

2. The protest is legal, in the usual form, and made in the *presence* of the proper number of witnesses. The original is annexed to the petition and note sued on, which is all that is required.

3. The protest shows a demand of the makers of the note, at the Branch of the Union Bank in Baton Rouge, where it

was made payable, and the cashier informed the notary there was no funds of the makers to pay their note. This was all that the holder could do, or was required of him. It was all the defendant could ask, until he furnished the cash.

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No counsel appeared for the appellant.

Simon, J., delivered the opinion of the court.

This suit is brought on a note of hand, alleged to have been drawn, *in solido*, by the defendants. The note appears to have been protested at maturity. There was judgment, *in solido*, against defendant Morris, one of the makers of the note, from which judgment he appealed.

It is unnecessary for us to examine the exceptions of the defendants to the sufficiency of the service of the petition, as there is no evidence in the record showing the alleged incorrectness of the copy served on them by the sheriff.

On the trial, the defendant, Morris, objected to the introduction in evidence of the protest of the note, on grounds which it is not necessary to notice, and said protest having been admitted by the court, he took a bill of exceptions. We are unable to see any good reason why the protest should have been rejected; the defendant, Morris, was one of the makers of the note, and whether it had been protested or not, does not lessen or increase his liability. Had no interest been stipulated in the note sued on, the effect of the protest would have been to charge the defendant with legal interest from its maturity; and it would have been good also to prove a demand, if it had been specially denied. In this case, there was perhaps no necessity for the production of the protest, but the defendant could not legally and reasonably object to it. His objection gave him an opportunity to bring up this appeal, but we think it is frivolous, and he must pay the damages allowed by law in such cases.

The maker of a note cannot object to the insufficiency of the protest, because whether the note is protested or not, does not increase his liability.

Protest is necessary to give interest when none is stipulated, and is good to prove a demand, if specially denied.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs and five per cent damages, as for a frivolous appeal.

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APPEAL FROM THE CITY COURT OF NEW-ORLEANS.

Where judgment is prayed, *in solido*, against the members of a firm, and one of the defendants denies his liability, *in solido*, his firm being only a *particular*, not a commercial partnership; he must show that both partners consented to the obligation, or that it was contracted for the benefit of the firm.

So, where judgment is asked against the members of a firm, *in solido*, and for *general relief*; and one of them denies that he is thus liable, it being only a *particular* partnership; evidence of the consideration of the obligation will be admitted, to show his liability for the whole claim, as having been contracted for *his benefit*.

This is an action on a promissory note, signed by "Mondelli & Reynolds." The plaintiff prays judgment, *in solido*, against the defendants; and for all *general and equitable relief*.

Mondelli alone answered. He admitted the signature of the firm, but denied his liability, *in solido*; his firm being a *particular* partnership.

On these pleadings and issues the cause was tried.

The evidence showed that Mondelli signed the name of the partnership firm to the note sued on; which was admitted to be a *particular* partnership. It further appeared, the note was given for bricks for the use of Mondelli alone. That he had by letter solicited indulgence from the plaintiff, promising to pay it by a certain time. Evidence was offered, and objected to, but admitted to show the consideration of the note, and that it was given for the benefit of Mondelli alone.

There was judgment for the plaintiff against Mondelli, for the amount of the note, and he appealed.

Labarre, for the plaintiffs, contended, that the defendant having admitted the signature, and alleged the partnership to be a *particular* partnership, Mondelli was bound to show that in making use of a partnership signature he was

especially empowered so to do by written articles of partnership duly recorded. Without this power, Reynolds could not be made liable for any part of the note. *Louisiana Code*, 2808, 2809, 2846.

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2. In the absence of written recorded articles of partnership, giving Mondelli the power to contract debts for Reynolds, he ought to have shown that he had been specially authorized by Reynolds to contract this debt, (*Louisiana Code*, 2843,) but even this evidence which would have been good against Reynolds could not have cured, as regarded plaintiff, the defect of non-compliance with the law requiring the articles of partnership to be recorded.

3. If the signature to the note was made by him, without proper authorization, it is his own wrong, and the plaintiff ought not to suffer for it. But were it possible to construe the law differently than it is done herein, Mondelli could not escape the liability shown to exist for the whole note by his letter, which was introduced in evidence without opposition.

4. A witness was offered to show the consideration of the note, and that it was for the benefit of the defendant alone. This was objected to as inadmissible under the pleadings, but it was properly admitted. The defendant averred, and it was not denied that the firm was a particular partnership, but the plaintiff had a right to show that the debt was not contracted for the benefit of the partnership, but of the defendant alone; and that he had no authority thus to bind the partnership.

Haynes, contra, insisted, that the testimony relative to the consideration of the note was improperly admitted under the pleadings. The plaintiff had alleged the defendants were liable *in solido*, as partners, and his evidence could only be received in relation to that matter which was the only thing in issue.

2. It is shown, that defendants are members of a particular partnership, and each one is liable for one-half of the claim.

3. Signing the name of the firm does not change their liability. 2 *Louisiana Reports*, 421.

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4. Solidarity must be expressed, which is not the case here. It can never be presumed. *Mayor et al. vs. Ripley et al.*, 5 *Louisiana Reports*, 126.

Simon, J., delivered the opinion of the court.

This case is now before us on a rehearing. We have carefully revised our former decision, and after a renewed investigation of the points of fact and of law, submitted to our reconsideration, we have come to a different conclusion.

Plaintiff, as holder of a promissory note made to his order, signed "*Mondelli & Reynolds*," alleges, that the defendants are bound, *in solido*, for the payment of said note, and prays judgment accordingly; he also prays for general relief. *Mondelli* alone having been cited, filed an answer, in which, after admitting the signature, he denies his liability, *in solido*; the firm of *Mondelli & Reynolds* being a particular partnership. On these issues, the parties went to trial, and the judge of the City Court having given judgment in favor of the plaintiff against *Mondelli*, for the whole amount of the note, the defendant took the present appeal.

An admission which we find in the record, by which it is admitted that a certain witness could prove that *Mondelli & Reynolds* were particular partners, renders it unnecessary to notice a bill of exceptions taken to the opinion of the court, refusing to grant a continuance applied for by defendant's counsel, on the ground of the absence of a witness who was to prove the same fact.

On the trial, plaintiff introduced a witness to prove the consideration of the obligation, and that the same was made by *Mondelli*, and for his benefit. The testimony was objected to by defendant, on the ground that plaintiff, in his petition, prays for judgment against *Mondelli*, *in solido*, as a member of the firm of *Mondelli & Reynolds*, and that evidence could not be admitted to prove what was not asked for in the petition. The judge *a quo*, received the evidence, and the defendant took his bill of exceptions.

We think the city judge did not err. It is true the plaintiff, in his petition, seeks to obtain a judgment against *Mondelli*,

in solido with Reynolds, as he was probably under the impression that they were commercial partners; and had the defendant limited his defence to the general issue, plaintiff might perhaps have been unable to recover in this action; not only on the principle that the *onus probandi* being thrown upon him, the *allegata* must agree with the *probata*, and therefore he could not have been allowed to prove a different contract or obligation; but also because solidarity being never presumed, he should have been bound to prove it, and would have failed in the evidence. In this case, however, the defendant himself puts in issue the particular partnership, out of which, he contends, this contract arose; and thereby admitting his liability for one-half, he must be prepared to show that both partners had consented to the obligation, or that it was contracted for the benefit of the firm; without such proof, if it was shown that he had signed the note in the name of the partnership, there would be no doubt of his being bound for the whole, as he had no right to bind his partner, except in the manner pointed out by law. The judgment prayed for by plaintiff, though one *in solido*, would virtually have the same effect, as, in both cases it would be for the whole debt. In this state of the pleadings, and under the issue made up by defendant, it became necessary to inquire into the origin of the debt, and into the consideration of the obligation; and, in our opinion, the evidence offered to extend Mondelli's liability as a particular partner, to the whole of the claim, and not to one-half only, as resulting from his answer, was properly admitted by the lower court.

Under this view of the question, we think that on the merits, the judgment of the City Court is sufficiently supported by the evidence. Mondelli signed the obligation in the name of the firm; its consideration was for bricks sold him by the plaintiff; it is not even shown that Reynolds ever had any knowledge of the contract. A letter signed by Mondelli, and read in evidence without objection, proves also that he was to pay the note sued on. He asks therein the plaintiff's indulgence, speaks of his prospect of being able to pay

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Where judgment is prayed, *in solido*, against the members of a firm, and one of the defendants denies his liability, *in solido*, his firm being a particular, not a commercial partnership, he must show that both partners consented to the obligation, or that it was contracted for the benefit of the firm.

So, where judgment is asked against the members of a firm, *in solido*, and for general relief, and one of them denies that he is thus liable, it being only a particular partnership, evidence of the consideration of the obligation will be admitted, to show his liability for the whole claim, as having been contracted for his benefit.

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towards the end of the month; alludes to the plaintiff's kindness towards himself, and promises to see plaintiff on his return from Mobile, &c. &c. It seems to us that the plaintiff is clearly entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the City Court be affirmed, with costs.

CHILDRESS vs. ALLIN ET AL.

APPEAL FROM THE COURT OF THE EIGHTH DISTRICT, FOR THE PARISH OF
LIVINGSTON, JUDGE JONES, OF THE DISTRICT, PRESIDING.

The court cannot receive as proper evidence, any document or fact which the judge *a quo* states in his judgment to have been proven. It must appear by proof independently of his opinion or statement.

So, where the judgment of a Parish Court is offered in evidence in the District Court, and which is not copied into the record, and attested by the officer of the court, but is embodied in the judge's opinion, it is insufficient, and cannot be used as evidence on the appeal.

This court will not dismiss the appeal for an imperfection in the record, but continue the case for a reasonable time, to have the record perfected.

This is a petitory action, in which the plaintiff sues to recover a section or six hundred and forty acres of land. He claims under an act of sale from one R. Duncan, who purchased the land in question at sheriff's sale, under an execution and judgment obtained by T. G. Davidson vs. Wm. and Stephen Allin, for one hundred dollars. The sheriff's deed recites, that in virtue of a writ of *feri facias*, from the Parish Court of Livingston, against the goods, &c., of Wm. and Stephen Allin, in a suit in which T. G. Davidson was plaintiff, he seized and sold the land in question, and R. Duncan became the purchaser, for the sum of one hundred

and seventy-one dollars. The judgment of this suit was offered in evidence, the *other papers being lost*. Duncan sold and conveyed to the plaintiff, and the act of sale is in evidence. Wm. Allin and wife are in possession, and claim the land as her property; she having purchased it from Stephen Allin. There is no evidence that it was ever her property. The title was confirmed to W. Allin, her husband, who conveyed it to S. Allin, together with all his stock, farming utensils, household and kitchen furniture, &c., the 4th of February, 1826, for two thousand dollars. In this situation it was seized and sold, and the sheriff's deed is dated the 15th August, 1834.

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There was judgment for the plaintiff. *The judgment under which the land was sold, is omitted in the record*; the judge, however, literally embodies it in his opinion at length, in entering up his judgment. The defendants appealed.

Curry, for the plaintiff, submitted the case on the following points:

1. This is in the nature of a petitory action, and the plaintiff has exhibited a complete and legal title to the land in contest, and is clearly entitled to recover. The defendants have shown no title.

2. The certificate of the clerk, is not made in conformity with law. It should state that the record contains all the evidence adduced on the trial, &c.

The plaintiff and appellee submits the case to the court, on the merits, or, on the insufficiency of the certificate. The judgment must, therefore, be either affirmed, or the appeal dismissed.

Hennen, for the defendants, contended that the evidence was insufficient to authorize a recovery. The plaintiff's title rests on the sheriff's deed, which is unsupported by the judgment under which the land purports to have been sold, and is, therefore, of no validity. *Donaldson vs. Winter*, 8 Martin, N. S., 175 and 162; 1 Louisiana Reports, 137.

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2. The plaintiff, not having made out his title or case, must be non-suited.

3. If there is any imperfection in sending up the record, by the clerk, it can be remedied: the appellants are not to suffer. *See acts of 1839, sec. 19, page 170.*

4. The judge's statement shows that he noted all the evidence; and if any is missing, it is the fault of the clerk.

Martin, J., delivered the opinion of the court.

In this case, the dismissal of the appeal is asked, on the insufficiency of the clerk's certificate; which does not state that the record contains all the evidence on which the case was tried, except under an *and so forth*. But there is a statement or note of the evidence, made by the judge, in which the different documents produced in evidence, are stated and marked by their titles and letters. One of these documents, is a judgment under which the land claimed is alleged to have been sold, which is described in the following words: "Judgment No. 4, T. G. Davidson vs. Wm. and Stephen Allin." This document, however, is not to be found, *in extenso*, in any part of the record, except in the judgment appealed from, where it is embodied at full length, without any certificate of its being a true copy from the clerk of the court who rendered it.

We have often held that this court cannot receive, as proper evidence for their consideration, any thing which the judge *a quo* states, in his judgment, to have been proven.

The record of the judgment under which the land was sold, not being attested by an officer of the court which rendered it, cannot be taken by us as the basis of our judgment.

The act of the legislature, approved 20th March, 1839, section 19, makes it the duty of this court, in a case like this, to refrain from dismissing the appeal, and to grant a reasonable time to have the record perfected.

It is, therefore, ordered, adjudged and decreed, that this cause be continued, to give sufficient time to complete the record.

The court cannot receive, as proper evidence, any document or fact which the judge *a quo* states in his judgment to have been proven. It must appear by proof independently of his opinion or statement.

So, where the judgment of a Parish Court is offered in evidence in the District Court, and which is not copied into the record and attested by the officer of the court, but is embodied in the judge's opinion, is insufficient, and cannot be used as evidence on the appeal.

This court will not dismiss the appeal for an imperfection in the record, but continue the case for a reasonable time to have the record perfected.

HODGE vs. WHITALL.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF

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Where a concordat was made by J. E. W., one of the members of the firm of W., J. & Co., and charged with the administration of the affairs of said firm, &c., of the one part, and the creditors of said firm, of the other, in which "a full and entire acquittance, and discharge as well, to the said J. E. W., as to the members of said firm, individually and jointly, of all claims, debts and demands, whatsoever" is granted: *Held*, that the parties of the second part acted only in the capacity of "creditors of the firm," and that J. E. W. was not thereby released from an individual debt he owed an individual creditor, who was a party to the concordat.

This is an action instituted on two promissory notes, one for three thousand dollars, and one for four thousand dollars, executed by the defendant the 9th November, 1832, payable two years after date, to the order of Whitall, Jaudon & Co., of which firm the maker of the notes was a member, and by them endorsed in blank. They purport to have been given in part of the price of a lot of ground in New-Orleans, and secured by a mortgage retained on it. There was a payment made on one of them of fifteen hundred dollars, the 19th February, 1838, by the defendant, to the present holder.

The defendant expressly denied being indebted to the plaintiff, in any manner whatever; having been released from this and all other claims by a concordat with his creditors, to which the plaintiff was a party.

The following clauses of the concordat constitute the grounds of defence:

"Personally came and appeared, Joseph E. Whitall, of New-Orleans, one of the members of the firm of Whitall, Jaudon & Co., trading in the city of New-Orleans, and charged with the administration of the affairs of said firm, which said firm is composed of the said Joseph E. Whitall, and Ashbel G. Jaudon, residing in Philadelphia, of the one part; and the undersigned, creditors of said firm, of the other

EASTERN DIST. *part*; who] hereby agree, that whereas the said firm of
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Whitall, Jaudon & Co. having, by the pressure of the times, various failures of their debtors, and losses in trade, become unable to meet their engagements, they propose extra-judicially, to make a cession, as well of the partnership effects as the individual property of the said J. E. Whitall, and an adjustment with their creditors on the following terms and conditions, to wit.:

"The said parties of the first part hereby transfer and assign to the parties of the second part, all the property, moveable and immoveable, rights, credits and effects whatsoever, in any wise belonging to or appertaining to said firm, or to the said J. E. Whitall, according to the annexed schedule, &c., to be administered, sold and disposed of by such syndic or agent, and at such times and on such terms as the said parties of the second part, or the majority in number and amount shall decide on; and in case of an equality in amount, as the majority in number shall decide on:

"The proceeds to be disposed of equally amongst said creditors, and any others who may within one year from the execution of this act choose to become parties; regard being always had to priority of privileges, and mortgages, where they exist, &c.

"That in consideration thereof, the said parties of the second part, as well as those who may hereafter become such, do covenant and agree, that they will give, and do by these presents give a full and entire acquittance and discharge, as well to the said Joseph E. Whitall, as to the members of said firm, individually and jointly, of all claims, debts and demands whatsoever."

The foregoing are the clauses in the concordat relied on. The notes now in suit are placed on the schedule, which is headed, "Statement of Whitall, Jaudon & Co.'s affairs," and are endorsed by the firm as the payees. They are placed under the head of "Bills Payable." Andrew Hodge, the plaintiff, is set down in the list of creditors, for twenty-six dollars and fifty-two cents. The lot of ground was placed among the assets under the head of "Real Estate," for which

Whitall gave the notes in question. On this evidence, the parish judge, presiding was of opinion, that the arrangement between the creditors of Whitall, Jaudon & Co. cannot be set up as a bar to the claim of a creditor of J. E. Whitall individually. Judgment was given for the amount due on the notes, and the defendant appealed.

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L. Peirce, for the plaintiff, urged the affirmance of the judgment, as being in accordance with law and the evidence. The concordat relied on did not discharge the defendant from his individual liabilities; and he is consequently bound as the maker of the notes sued on.

Strawbridge, for the defendant, insisted that he was discharged by the concordat, because it gives a full and entire discharge to J. E. Whitall, as well to the members of the firm, individually. The plaintiff was a party to this act discharging the defendant, and cannot now claim this debt from him.

Martin, J., delivered the opinion of the court.

The defendant resists the plaintiff's action on his two promissory notes, on the allegation that he is released by a concordat with his creditors, to which the plaintiff was a party. The court rendered judgment against him, being of opinion that the concordat, with the creditors of the defendant, and *Jaudon, his partner*, could not be set up against the claim of his individual creditor.

The record shows, that the notes were drawn by the defendant to the order of his firm, and by them endorsed, in blank, to N. Goodale, and by him, in the same manner, to the plaintiff.

By the concordat between the firm and their creditors, one of whom the plaintiff was, "a full and entire acquittance and discharge, as well to the said Joseph E. Whitall as to the members of said firm, individually and jointly, of all claims, debts and demands, whatever," was granted. The parties to the concordat are "Joseph E. Whitall, one of the members of the firm of Whitall, Jaudon & Co., trading in

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the city of New-Orleans, and charged with the administration of the affairs of said firm, which said firm is composed of the said Joseph E. Whitall and Ashbel G. Jaudon, residing in the city of Philadelphia, of the one part; and the creditors of said firm, of the other." It is clear that the parties of the second part acted in this concordat in no other capacity than as creditors of the firm; and that the debts which were the objects of the concordat, were those of the firm only. The judge *a quo*, therefore, correctly concluded that the defendant, being the plaintiff's debtor, as maker of the note in his individual name, and also as a member of the firm, who were the endorsers, the arrangement made between the creditors of the firm and their debtors, could not be opposed to the claim of an individual creditor of the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

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ON A REHEARING.

The court cannot inquire into the terms and conditions on which property mortgaged by special privilege, should be sold, which has been given up to the creditors by a concordat.

If the property mortgaged and ordered to be sold to satisfy the judgment is not sufficient, the defendant not being released by the concordat, will be personally bound to pay the balance due on the judgment, if there be any.

Strawbridge, for the defendant, applied for and obtained a rehearing in this case. He insisted that the judgment was erroneous in construing the concordat as only extending to the parties in their partnership capacity, and in relation to partnership claims. If the enunciative terms only are to be attended to, and allowed to control, the interpretation given by the court would probably be correct; but the rule of inter-

pretation is, that "where a clause is clear and explicit, and leads to no absurd consequences," we are not to control them by other clauses. *Louisiana Code, 1940, 1943.*

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2. The clause of *release* of the defendant individually, and from all claims and demands whatsoever, is clear and not the least doubtful in its terms. Upon an examination of the whole act, there is abundant proof that the parties to the *concordat* did contract with each other individually. Independent of the strong terms expressed to that effect in the clause of *release*, two other circumstances show it: Whitall transfers his private property; and is this done in his individual or his partnership character? could the other partner have transferred it, had he been the acting and liquidating partner as Whitall was? Surely not. The very lot of ground for which these notes were given, he gave up and put in his schedule. The other partner, or the partnership, could have no control of this property. The title was in his name.

3. According to another clause in the *concordat*, "regard is to be had to priority of privileges and mortgages, where they exist." How could Hodge claim a mortgage, except as the creditor of Whitall, individually. He had no mortgage or privilege as against the *firm*.

4. Of the intention of Whitall, it seems to me impossible to doubt. That he intended to deliver the whole of his private property to pay an endorsement of his firm, whilst he left himself exposed personally, as drawer of the same note, which he might be sued for the next day; when he had given to his creditor all his means of paying, thus effecting nothing but a release of his co-partner, is an act so completely opposed to those great principles of action, self-love and self-interest, as to be incredible. It is a construction leaning much more to the "absurd consequences" of article 1940, than that which is contended for.

5 Lastly, did Mr. Hodge ever look at these words: I give "(as well to the said Joseph E. Whitall) as to the members of the said firm *individually and jointly*, an acquittance of *all claims, debts, and demands whatever*;" if he did, he must have seen they were large enough to include Whitall's

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individual debts, according to the plainest meaning of its terms. But *nemo presumitur donare*, we are told. In answer, we ask no presumption; we stand on the plain sense, the letter of the contract. It is the plaintiff who is fishing for presumptions to limit and restrict his agreement, and if they were doubtful, our code enacts that in such case it is to be interpreted against him who obligates himself. *Louisiana Code*, 1952. The plaintiff is here obligating himself to release Mr. Whitall. "The seller is bound to explain himself clearly respecting his obligations; any obscure or ambiguous clause is construed against him. *Louisiana Code*, 2449.

Simon, J., delivered the opinion of the court.

In this case, a rehearing having been granted, we have again considered, with the utmost attention, the grounds on which the defendant relies to maintain his defence, and we have been unable to discover any reason why the former decision of this court should be disturbed.

The court cannot inquire into the terms and conditions on which property, mortgaged by special privilege, should be sold, which has been given up to the creditors by a concordat.

If the property mortgaged and ordered to be sold to satisfy the judgment, the defendant not being released by the concordat, will be personally bound to pay the balance due on the judgment, if there be any.

We cannot inquire into the question relative to the terms under which the property, mortgaged by special privilege in favor of the plaintiff, should be sold; nor can we indicate in what manner the sale thereof should be executed, in satisfaction of the judgment appealed from; because, the creditors are not before us, and it would be improper on our part to give any opinion on the legal effect and consequences of the acts, in which the plaintiff appears to have consented to abide by the terms to be fixed afterwards by a meeting of the creditors. Whether the plaintiff has waived his right to force the sale of the property for cash or not, is a question in which all the creditors are necessarily interested. It suffices for us, to say that the judgment, which we have affirmed, ordering that it shall be paid by privilege on the proceeds of the sale of the property, under whatever terms, and in whatever manner the property be sold, the defendant, not having been released as by him contended, will be personally bound to pay the balance due on the judgment, if any there be, after the amount of said proceeds shall have been ascertained and duly imputed. This is all that could

be decided upon between the parties to this suit, and the judgment appealed from could not provide any further.

It is, therefore, ordered, that the judgment of this court remain undisturbed.

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SERAPURN, SYNDIC, ETC. VS. BOUSQUET, ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a slave died from a disease which was not incurable by its nature, nor had become so by the progress it had made at the time of the sale, and it is shown that the slave did not receive from the purchaser all the necessary care and medical attendance which the malady required, and it was in his power to give, he cannot recover back the price he had paid, in a redhibitory action or exception.

Where purchasers of a slave, who became sick and died soon after, did not act as prudent men would have done, and the loss of the slave may be attributed to their fault and neglect, they cannot avail themselves of redhibition.

This is an action against the maker of a promissory note for five hundred and fifty-two dollars. The defendants admit their signatures to the note, but aver that it was given for the price of a slave, guaranteed against all the vices and maladies prescribed by law; and that, in a few weeks after the sale, said slave died of a disease known to the seller at the time, and to the knowledge of the present plaintiffs; and that, in consequence, the consideration of said note has failed. They also plead the want of amicable demand, and reconvene and claim five hundred dollars in damages.

The testimony of two physicians was taken. One deposed, that three days after the sale he was called in, and

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the negro boy was affected with a *gastro autérite*, and he cannot say how long since the disease commenced; is of opinion it existed before the sale, but was not incurable by its nature, or by the progress it had made at the time. The other states, it was through the fault and neglect of defendants, and the want of regular medical aid for nearly a month, that caused the boy's death. It was also in evidence that, at the time of sale, it was proclaimed to the bystanders that the boy Adolphe was sick of a fever, and had been so for three or four days, but was guaranteed in other respects. The price of the slave was four hundred and thirty dollars, which was included in the note sued on.

The district judge was of opinion the boy died of a redhibitory disease, and that the defendants should be allowed the price, and have it deducted from the amount of the note. Judgment was rendered accordingly, and the plaintiff appealed.

M. Blache, for the appellants, insisted that it was fully shown that the disease of which the slave died was not incurable, but that he died through the fault and neglect of defendants.

2. It was incumbent on the defendants to show, that they had done every thing in their power to effect the recovery of the slave, but in vain; that the disease had baffled all medical skill, after every attention had been paid to ensure his recovery: had all this been done, they might, perhaps, have been entitled to a rescission of the sale. The judgment, as it stands, should be reversed, and one given for the plaintiffs.

Pepin, for the defendants and appellees, contended that the boy died of a disease which existed at the time of sale, and which proved incurable, after calling in medical aid. It is said the disease was not incurable in its nature. In this respect, no disease may be said to be incurable; but when death ensues after medical aid has been given, it proves incurable, to all intents and purposes.

2. The evidence shows that the boy was well taken care of. Two physicians were called in, and their skill and aid

afforded him, but to no purpose. The judge who tried the case, was of opinion the redhibition was fully established. This court will not disturb a judgment or verdict, unless manifestly erroneous.

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Simon, J., delivered the opinion of the court.

This suit is brought on a promissory note. The defendants admit their signature, and aver that the note was given in consideration of the sale of a negro boy, warranted free from any of the vices and maladies pointed out by law, but that a few weeks after the sale, the negro died; and that his death was occasioned by a disease which, within the knowledge of the plaintiffs, he was afflicted with at the time of the sale.

The district judge deducted the price of the slave from the amount of the note, and gave judgment for the balance in favor of plaintiffs, who, being dissatisfied therewith, took the present appeal.

Several witnesses have been examined, to prove the cause of the death of the slave; and their evidence shows that his death was produced by an acute disease, that had just made its appearance at the time of the adjudication, and which the physicians who have testified, qualify to be a *gastro autérite*. The existence of this malady, which lasted for about a month, was ascertained two or three days after the sale at auction; and although defendants could not have been deprived of their recourse in warranty, because it was announced at the time, that the negro had been sick with the fever for three or four days previous, still, it was a sufficient warning to induce them, as prudent men, to procure medical aid, and to have the negro regularly attended to by a physician. According to the opinion of the two physicians, one of whom was called only once, two or three days after the adjudication; and the other, two or three days before the death of the negro, and when, as he states, the slave was in the last period of the malady, and in a desperate state. The disease was not incurable by its nature, nor had it become so by the progress it had made at the time of the adjudication. Had it been pro-

Where a slave died from a disease which was not incurable by its nature, nor had it become so by the progress it had made at the time of the sale, and it is shown that the slave did not receive from the purchaser all the necessary care and medical attendance which the malady required, and it was in his power to give, he cannot recover back the price he had paid, in a redhibitory action or exception.

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Where purchasers of a slave who became sick and died, soon after, did not act as prudent men would have done, and the loss of the slave may be attributed to their fault and neglect, they cannot avail themselves of redhibition.

ven by the defendants, that the slave had received at their hands all the necessary care and assistance, and that they had done every thing in their power to effect his recovery, by affording him such medical aid as the nature of his malady required, there would have been no doubt, under the circumstances, of their being entitled to the reimbursement of the price and of the expenses; but it appearing, from the evidence, that they did not act as prudent men would have done, and that, so far as it has been shown, the death of the slave may be attributed to their fault and neglect, we think they ought not to recover, and that the district judge erred in discharging them from the obligation of paying the price of the slave.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the plaintiffs do recover of the defendants, the sum of five hundred and fifty-two dollars, with five per cent. interest per annum thereon, from the 3d of April, 1838, until paid, with the cost of protest, and costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where two of the original plaintiffs, in a joint action, die after judgment, and a rule is taken by the other seven, on the surety in the bail, to show cause why he should not pay their share of the judgment: Held, that the judgment severed their joint interest, and that each has a right to recover his *virile* share from the surety.

The authority of an agent of the plaintiffs, and of the attorneys, in prosecuting the original suit, is put to rest by the judgment, and cannot be questioned in a proceeding against the bail.

The premature signing of judgment, as between the parties, is not assignable as error.

When it appears that the defendant is a non-resident, but has an attorney of record, service of notice of judgment on the attorney, is sufficient. EASTERN DIST.
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It is not necessary for the sheriff to call on the defendant's attorney, when he is absent, to point out property; and the return of "no property, after demand of the plaintiff's attorney," was sufficient, to authorize a *capias ad satisfaciendum* to issue.

The fact that the *ca. sa.* was returned two days before the return day, is not material in a proceeding against the bail, when the rule on him to pay the judgment was not taken until the return day, and full notice given before trial on it.

Where the principal debtor was surrendered to the sheriff on the 23d, and judgment against the bail bears date the 18th January, the surrender comes too late to operate a release of the bail.

This is a proceeding on a rule to render the surety liable on a bail bond.

The plaintiffs, being nine in number, originally, and members of the Creek nation of Indians, obtained a judgment against Archibald Hotchkiss for ten thousand dollars, after arresting and holding him to bail. He was arrested on the affidavit of one Dubois, as the agent of the plaintiffs. The judgment purports to have been rendered the 26th June, 1839, and was signed the 1st July. A *feri facias* was taken out the 26th July, and returned "no property found, after demand of the plaintiff's attorney, the defendant being absent," on the 19th September following. On the 11th October, a *capias ad satisfaciendum* issued, returnable on or before the fourth Monday in December, which was the twenty-third day of the month. It was, however, returned by the sheriff on the Saturday preceding, being the twenty-first. On Monday, the twenty-third, the plaintiffs, by counsel, took a rule on the present defendant, who was the surety in the bail bond given by Hotchkiss, to show cause why judgment should not be entered up against him for six thousand dollars, the amount for which he was liable to them on the original judgment. Before the trial of the rule, two of the plaintiffs having died since the rendition of the judgment, leave was granted discontinuing this suit as to them.

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On the 18th January, 1840, judgment on the rule was rendered and signed, decreeing the defendant to pay seven-ninths of the bond subscribed by him, and he appealed.

Maybin, for the appellant, urged a variety of objections to the proceedings and judgment against the defendant, which are noticed at length in the opinion of this court.

Elmore and King, for the appellees, insisted that the judgment was correct in every respect, and that the proceedings were regular and legal.

Bullard, J., delivered the opinion of the court.

The plaintiffs, nine in number, being Indians of the Creek nation, brought suit jointly against one Hotchkiss, and recovered the sum of ten thousand dollars. The present appellant having become bail for the defendant, the plaintiffs took a rule upon him, to show cause why he should not be condemned to pay the amount of his bond. He is appellant from a judgment against him for seven-ninths of the amount of said bond, two of the original plaintiffs having died, and the suit being discontinued as to them.

The bail, in answer to the rule, first sets up as an exception to the proceeding against him, the death of two of the original plaintiffs, and claims that the suit should be dismissed.

Where two of the original plaintiffs, in a joint action, die after judgment, and a rule is taken by the other seven on the surety in their bail, to show cause why he should not pay their share of the judgment: *Held*, that the judgment severed their joint interest, and that each has a right to recover his virile share from the surety.

We are of opinion the court did not err in overruling this exception. It is a general rule, undoubtedly, that all parties in interest should join in a suit, or be made parties. But even in ordinary cases, there may be exceptions growing out of the extreme difficulty, if not impossibility of doing so. In the present case it appears that all the joint creditors joined in the original action, and we are of opinion that the judgment severed their joint interest, and that each has a right to receive his virile share; although, if driven to an execution, it might be necessary to pursue the judgment in the form of the writ. The bail engaged to pay the judgment of this court upon certain conditions, and that judgment is in substance, that each of the original plaintiffs receive of the

defendant his share of the claim. It would be manifestly impossible to bring in the heirs of a Creek Indian, and the defendant has shown no necessity for so doing. 14 *Louisiana Reports*, 27; 2 *Story's Equity* 142; 3 *Vesey*, 314; 1 *Johnson's C. Reports*, 350; 5 *Louisiana Reports*, 287; 4 *idem.*, 100.

He next denies the agency of Dubois, on whose affidavit the order of arrest was issued, and of the attorneys engaged in prosecuting the original suit. We concur with the district judge, that these questions are put to rest by the judgment, and that the authority of the agent and attorneys cannot be questioned in this manner, especially without affidavit, inasmuch as the presumption is in favor of the authority.

The defendant in the rule, next relies upon various alleged irregularities in the proceedings against the original defendant, to wit:

1. That the judgment was signed prematurely, without allowing the legal delay for asking a new trial.
2. That notice of judgment was not legally served.
3. That a proper demand of property was not made to satisfy the *fi. fa.*
4. That the *ca. sa.* was returned prematurely.
5. That there were other persons bound as bail, who should have been sued at the same time.

I. Even admitting that the judgment against Hotchkiss, was signed prematurely, it does not follow that the defendant was deprived of the right of moving for a new trial, as between the parties such premature signature is not assignable in error. 7 *Martin, N. S.*, 233.

II. The notice of judgment was served on one of the attorneys of the defendant, and it appears by the proceedings that he was a resident of Texas, and that he had no domicile in the state. We are of opinion that this is sufficient, and that it is not necessary to appoint a curator *ad hoc*, for the purpose of receiving notice of judgment, when there is an attorney of record.

III. In execution of the writ of *feri facias*, the sheriff appears to have done all in his power. He could not call on the defendant, who was absent, to point out property; and it

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The authority of an agent of the plaintiff, and of the attorneys, in prosecuting the original suit, is put to rest by the judgment, and cannot be questioned in a proceeding against the bail.

The premature signing of judgment, as between the parties, is not assignable as error.

When it appears that the defendant is a non-resident, but has an attorney of record, service of notice of judgment on the attorney, is sufficient.

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perty; and the return of "no property, after demand of the plaintiff's attorney," was sufficient to authorize a *capias ad satisfaciendum* to issue.

The fact that the *ca. sa.* was returned two days before the return day, is not material in a proceeding against the bail, when the rule on him to pay the judgment was not taken until the return day, and full notice given before trial on it.

Where the principal debtor was surrendered to the sheriff on the 23d, and judgment against the bail bears date the 18th January, the surrender comes too late to operate a release of the bail.

is not, in our opinion, the duty of that officer to call on the defendant's attorney, to show the property of his client. We think the return in this case justified the issuing of the *capias*. Code of Practice, articles 726 and 727.

IV. The *ca. sa.* was made returnable on or before the fourth Monday of December, the 23d of the month, and was returned on the 21st. The rule on the bail was taken on the 23d December, and returnable on the 6th of January. It was answered on the same day, and final judgment rendered thereon upon the 18th. During that period, the bail might have exonerated himself, by surrendering the defendant. We cannot notice any thing which occurred after the rendition of the judgment. The 22d of December being Sunday, the writ could not have been served; and on Monday, the 23d, the plaintiffs had a right to require of the sheriff to return it. Thirteen days notice was given, exclusively of the day on which the rule was taken, and that on which it was returnable. The bail, in our opinion, has no right to complain, inasmuch as he had from the 11th October, when the *ca. sa.* issued, until the 18th of January, within which time he might have surrendered the defendant, who had forfeited the bond by leaving the state.

V. The record does not show any other bail bond than that signed by the present appellant.

It is further urged, that the principal was surrendered on the same day that the judgment was signed, although it was rendered several days before. The record does not show at what time the judgment was signed. It bears date January 18th. We are of opinion that a surrender to the sheriff on the 23d, did not operate the release of the bail, according to articles 231 and 235, of the Code of Practice.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. HELENA.

Partial and provisional distributions of property among co-heirs, do not amount to a final partition, is not conclusive on those not parties, and the property in possession of the co-heirs, is liable to be brought into a final partition.

The Probate Court is without authority to compel property of an estate, which has been alienated by an heir, and in the possession of a third person, to be brought into a final partition among all the heirs. It cannot inquire into the validity of the title, as the party does not hold as heir.

Heirs who are of age, and parties to a provisional partition, cannot complain; but minors and co-heirs not made parties, are not concluded, and their *portions*, in a final partition, ought to be made up to them, according to the principles of equity.

This is an action of partition, instituted by the children and representatives of Thomas Kemp, deceased, against the brothers and sisters and their descendants, of David Kemp, who died in 1820, without issue, leaving a large property in the parish of St. Helena, which had been inventoried and partially divided, by several decrees of the Probate Court. The plaintiffs represent Thomas Kemp, who was also a brother of David Kemp, whose estate is sought to be partitioned. The plaintiffs show that Isaac and Demcy Kemp, brothers of the deceased, took possession of the succession, and acted as administrators or curators, and have rendered themselves liable to the petitioners and their co-heirs, for the property of said succession; and that Isaac Kemp sold a portion of the same, consisting of negroes, to Abner Wamack, who now holds them and their increase. They, therefore, pray that an inventory be made of all the property of said estate that can be found, and in whose hands soever it may be found; that Isaac, Demcy and Rebecca Kemp, the heirs of Asa Kemp and Abner Wamack, be all made parties, and cited; and that a partition be judicially and legally made;

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that Isaac, Demcy and Rebecca Kemp, be condemned to account for all the property of said estate, at the inventory prices; and that they and the said Wamack be required to account and allow for the hire and rent of said property for the time they have had it, which is worth one hundred dollars a year for each negro; and they pray for general relief.

Wamack appeared by counsel, and excepted to the jurisdiction of the Probate Court, that the matters set forth in the petition are not cognizable in said court.

The defendants all severed in their answers; they all, however, pleaded that the estate of David Kemp had been properly administered by Isaac and Demcy Kemp; and their accounts were legally made out and presented to the Probate Court, and were homologated by said court, which judgment is set up as *res judicata*; that the partition based on this judgment, cannot now be disturbed; that a tract of land assigned to the plaintiffs, was adjudicated to their tutrix, with the advice of a family meeting, who must account for it at the price of adjudication, &c.; that the former partition, and other proceedings in the Probate Court, were regular and valid, all the heirs being represented and made parties thereto. Wherefore, all the judgments of said court, in the matters of said succession, are pleaded as *res judicata*.

Wamack also avers in his answer, that the partitions already made, although provisional, gave each heir a valid title to the property set off to each, and that he could validly cede or sell it to a third person, &c.

Upon the pleadings and issues made up, there was a mass of evidence offered by both parties, embracing the records and documents of all the former proceedings in the succession of David Kemp.

The Judge of Probates gave judgment rescinding the former partitions, and ordered a new partition to be made. The right and title of Abner Wamack to the slaves purchased by him from Isaac Kemp, one of the heirs, was confirmed to him, as having been purchased in good faith, and

which he held by a just title, sufficient to support the pre-
scription of five and ten years.

The plaintiffs, and Isaac, Demey and Rebecca Kemp, defendants, all appealed.

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Andrews, for the plaintiffs.

1. The only principal question, in fact, in the case, is whether A. Wamack, who purchased from Isaac Kemp, one of the heirs, can be brought into the Probate Court, and a partition had of the property in his possession. We contend that he can: That the informal partition or division gave no distinct rights and interests in the property: That it continued to belong to the heirs *in common*; and that he, Wamack, by his purchase became a co-proprietor, and he sets up no adverse title. He claims under Isaac Kemp, and can only claim his rights, and no more. Vendee has no greater rights than his vendor.

2. The rights of the minors were not alienated, and could not be, except by judicial definitive partition allowed by a family meeting. *Civil Code*, page 186, article 162. See *Louisiana Code*, 1438; *Civil Code*, page 16, article 14; *idem.*, page 18, article 18.

Lawson, for the defendants, argued to show that all the former proceedings had, in the settlement of this succession, were valid and binding on all the parties.

2. That, as regards Wamack, he cannot be brought before the Probate Court in this proceeding; and that he holds the property purchased by him from one of the heirs of Kemp, by a good and valid title, and cannot be disturbed.

Bullard, J., delivered the opinion of the court.

The petitioners represent, that they are the children of Thomas Kemp, and as his representatives, entitled to inherit a part of the succession of his brother David Kemp, who died after their father. That while they were minors, partial and informal distributions of a part of the property was made, but that no legal partition ever took place among the co-heirs.

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 June, 1840. purchased by Abner Wamack, of one of the heirs, and is
 liable to partition in his hands. This suit is brought for a
 final judicial partition, and Wamack was made a party.

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Wamack pleads to the jurisdiction of the Court of Probates, and the co-heirs set up the former partitions as having the force of the thing adjudged. The probate judge annulled the former partitions, and confirmed the title of Wamack under one of the co-heirs.

It is admitted of record in this court : 1. That the second partition complained of was made as set out, and that the act evidencing the fact was given in evidence by both plaintiffs and defendants.

2. That the plaintiffs in this action were not parties to the act of partition.

3. That the property partaken was the same mentioned in the *procès verbal* of the formation of lots, and on record in the suit.

Partial and provisional distributions of property among co-heirs do not amount to a final partition, is not conclusive on those not parties, and the property in possession of the co-heirs is liable to be brought into a final partition.

The Probate Court is without authority to compel property of an estate, which has been alienated by an heir, and in possession of a third person, to be brought into a final partition among all the heirs. It cannot inquire into the validity of the title, as the party does not hold as heir.

We concur with the Court of Probates in opinion that the two partial and provisional distributions of property among the co-heirs do not amount to a final and definitive partition of the estate. It is clear that those proceedings are not conclusive upon the present plaintiffs, who were not parties. It follows as a corollary, that the property yet in possession of any of the co-heirs is liable to partition, but it by no means follows that the portion of the property alienated by one of the heirs, and in possession of third persons, can be brought into the partition by authority of the Court of Probates. Although Wamack acquired really no greater right than that of the co-heir under whom he holds, yet, the Court of Probates was without jurisdiction to inquire into the validity of his title ; and as he does not hold as heir, that court was without jurisdiction as to him. His exception ought, in our opinion, to have been sustained.

As it relates to the heirs who were of age at the time of these partitions, they have no right to complain, and so far as they are concerned, those acts out to be made valid. But the minors and those who were not parties are not concluded,

and their portions ought to be made up to them according to principles of equity. Such partial and informal divisions of property ought not to be treated as absolute nullities, especially when they have been acquiesced in for a series of years; and while the rights of minors are to be protected, other vested rights are, if possible, to be maintained. In cases of this kind, where it is probable the parties acted in good faith, though not in a manner strictly legal, it is much to be lamented that such difficulties cannot all be adjusted by amicable compromises, rather than by appealing to the rigors of the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, so far as it relates to Abner Wamack, be avoided and reversed, and that the plea to the jurisdiction of the Court of Probates, as to him, be sustained, and the suit dismissed, and that it be affirmed as to the rest; the appellees paying the costs of the appeal; and that it be remanded to the Court of Probates for further proceedings, according to law.

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Heirs who are of age, and parties to a provisional partition, cannot complain; but minors and co-heirs not made parties, are not concluded, and their portions, in a final partition, ought to be made up to them, according to the principles of equity.

STATE OF LOUISIANA vs. JUDGE OF THE PARISH COURT.

AN APPLICATION FOR A MANDAMUS.

A *mandamus* will not be allowed, to compel the judge of an inferior court to proceed in the trial of a cause forthwith, in which he has granted a continuance.

No appeal lies from the continuance of a cause, when there has been no final judgment.

This is an application for a *mandamus*, to compel the judge of the Parish Court to try the case of *Kernan vs. Chamberlain & Beldin*, forthwith. The applicants allege,

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that said cause was at issue the 14th May, 1840, and set down for trial the 4th June following; that on that day, the plaintiff, with great difficulty, procured the attendance of his witnesses, (twelve in number,) and was ready, and insisted on going to trial as soon as the cause was called; but that the defendants applied for a continuance of the cause, upon the facts disclosed in an affidavit.

The plaintiff alleges, that the court granted the continuance, although it was apparent, from a simple inspection of said affidavit, that it did not entitle the party to a continuance, and he strenuously opposed it, and pointed out the defects and insufficiencies of the affidavit, but the judge overruled his opposition, and the continuance was granted.

He prays that a *mandamus* issue, commanding the parish judge to proceed forthwith in the trial of his cause, on the ground that the continuance will cause him an irreparable injury, &c. The plaintiff moved in this court for a rule on the judge of the Parish Court, to show cause why the *mandamus* should not issue, as prayed for. The court took the case into consideration.

Schmidt and Deslir, supported the motion for the rule.

1. The plaintiff, in this suit, applies to the Supreme Court to redress a *two-fold denial of justice*, committed, as he alleges, by the parish judge, in continuing his cause, when the law entitled him to have it tried.

"A judge who refuses, or neglects, to render justice *when it is due*, betrays doubly his duty. For he not only deceives the expectation of the sovereign who has delegated to him the noblest portion of his authority, but he is wanting in duty towards his fellow-citizens, to whom, as society is at present organized, the administration of justice is indispensable." Such is the language of some of the most distinguished jurists of the age, who, in fact, only repeat the sentiments of the legislators of every age.

2. That the legislation of Louisiana is not justly chargeable with any omission on this head, as well as that it is the province of the Supreme Court to take cognizance of the

present cause, and order a *mandamus*, will be obvious from the following considerations :

The facts alleged by the petitioner must be taken for true, and no one can doubt that they amount to a *denial of justice*.

The Code of Practice was originally composed in the French language, and many of its terms are derived from the jurisprudence of France, and, among others, the term "*deni de justice*," which has been translated a *denial of justice*.

We must consequently look to the authors of that country for an explanation of its signification.

Merlin's Rep. de Jurisprudence, vol. 7, *Ve deni de justice*, defines it : "Le refus que fait un juge de rendre justice, quand elle lui est demandée;" and he adds, "ne pas rendre la justice quand elle est due, c'est en quelque façon commettre une injustice," &c.

Toullier, vol. 11, p. 263, No. 224, treating of delits and quasi delits, styles it "un retardement injuste de juger."

Common sense, and the plain construction of language, sanction these definitions, since it is obvious, that he who refuses to judge, when the law says he shall, violates the law as completely as if he had decided the cause contrary to law ; and reason and justice equally require, that if there be a remedy in the latter case, there should also be one in the former.

3. In looking at the Code of Practice, we accordingly find, article 830, that one of the objects of a *mandamus* is to prevent a denial of justice ; and if this law be still in force, and not contrary to the constitution, which is the fundamental law of the land, the Supreme Court will be guided by it.

That this article of the Code of Practice has been repealed, will certainly not be contended. We must, therefore, look to the constitution, to ascertain if it presents any obstacle to its execution.

The Constitution, article 4, sections 1 and 2, provide, in substance, that there shall be a Supreme Court, which shall

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EASTERN DIST. have *appellate jurisdiction only*, where the matters in dispute exceed three hundred dollars.

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The constitutional restrictions are two-fold, viz.:

1st. Amount in litigation must exceed three hundred dollars.

2d. The jurisdiction must be *appellate*.

These barriers, solemnly imposed by the fundamental laws of the land, cannot be transcended by the legislature, nor by any other power, while the constitution remains unchanged; but, within the limits thus fixed, the legislature has absolute power, and the judiciary cannot refuse to carry its laws into effect, when those laws are confined to the circle thus traced around them, without being guilty of a dereliction of duty.

Hence, the legislature possesses the power to designate in what cases appeals shall lie from interlocutory judgments, and if it had authorized appeals in all cases, instead of those only where such judgments cause *irreparable injury*, can it be doubted that the Supreme Court would have taken cognizance of such appeals?

4. If it be true, therefore,

1st. That the parish judge has been guilty of a denial of justice;

2d. That the law authorizes the plaintiff to apply to the Supreme Court for a *mandamus*, in order to make the parish judge correct an error into which he has fallen, no doubt involuntarily; and

3d. That there exist no constitutional restrictions, which forbid the court to execute the law;

It appears that the inevitable corollary, which follows from the above propositions, is, *that the mandamus must issue*: since the law is *positive*, it is *constitutional*, and the applicant has brought himself *within its provisions*.

5. Where a law is positive, the *utility* or *necessity* of its application, is an inquiry which does not appertain to the *judicial power*. Its province is, to determine how the law affects the rights of the parties litigant in any given case; but not to decide the necessity, or utility, of such application. This may safely be entrusted to the discernment of the

suitors, who, alone, pay the penalty for having provoked a decision which cannot profit them.

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That the order of the court would be nugatory, or without effect, in the present case, is impossible.

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The first, and most important effect of such a decision, will be to establish a precedent for the instruction and government of the inferior tribunals, in all similar cases.

The second effect, will be to circumscribe a supposed discretionary power as to the continuance of causes in the inferior courts, which the judges think they possess, even where the law has taken away all discretion.

The third effect, will be to enable the plaintiff to try his cause much sooner than he otherwise would be able to do, and thus save much unnecessary expense and trouble to all persons concerned, both parties, witnesses, &c.

Morphy, J., delivered the opinion of the court.

This is an application for a rule on the judge of the Parish Court, in and for the parish and city of New-Orleans, to show cause why a *mandamus* should not issue, commanding him to proceed forthwith to the trial of this cause. It appears that when the case came on to be tried in the court below, it was ordered to be continued by the judge, on an affidavit made by one of the defendants, for reasons said to be insufficient in law; and notwithstanding an offer on the part of plaintiff, to admit that the witness alleged to be absent would, if present, swear to such facts as the defendant, who had moved for the continuance, might disclose under oath. We are of opinion that no *mandamus* should issue in a case like the present. We are called upon to revise an opinion expressed by an inferior tribunal, from which no appeal could be taken. We have never questioned the authority of the legislature to regulate the exercise of the appellate jurisdiction given to this court in all civil cases, in which the matter in dispute exceeds three hundred dollars. Art. 566 of the Code of Practice, provides that an appeal can be taken from interlocutory judgments, only when such judgments work an irreparable injury. Supposing that the judge in this case has erred, no irrepara-

A *mandamus* will not be allowed to compel the judge of an inferior court to proceed in the trial of a cause forthwith, in which he has granted a continuance.

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ble injury can be said to flow from this order. The case stands continued, and we have no reason to believe that it will not be fairly tried at another term. Mere delay cannot be regarded as an irreparable injury; for this reason, it has more than once been held in this court, that no appeal lies from an order granting a continuance. 11 *Martin*, 274, *Fortin vs. Randolph*; 1 *Martin, N. S.*, 597, *Campton et al., vs. Patterson*. Should we inquire into the alleged error in the order of the judge on the *mandamus* prayed for, we would be allowing an appeal from it *alio nomine*; and whenever, in the exercise of their discretionary powers, the judges of the inferior courts should continue a cause, on whatever grounds, we would be called upon to test the sufficiency and legality of such grounds. But even should we allow such a course to be pursued, we do not perceive what advantage would be gained by it, or what useful purpose would be answered. We could not fix any particular day for the trial of this cause; nor could we give it any preference or priority, over the other suits pending in the Parish Court. It would have to be set down as any other case, according to the rules of said court. Our opinion, then, on the order of continuance made below, could lead to no decree, promoting in any way the ends of justice; and would, moreover, place us in the awkward situation that, should another continuance be asked on the same grounds, and the judge should refuse it in pursuance of our opinion, the appeal which might afterwards be taken would, as to this part of the case, be from our own judgment, not from that of the inferior tribunal.

It is said that the judge has been guilty of a *denial of justice*; and we are referred to article 830, of the Code of Practice, as fully authorizing the remedy asked for. We are not prepared to say that there has been, in the present case, a denial of justice in the sense of the article above quoted. There has been, on the part of the judge below, no refusal to take cognizance of a case within his jurisdiction, or to act on the application of parties before him. He has pronounced on an incidental question presented to him in the progress of a cause; and if he has committed an error, it is one which

cannot interfere with the merits of the cause, if they be brought before us on a regular appeal. But this court, from its earliest organization, has always disclaimed a supervisory control over the inferior courts, in matters not incident to its appellate jurisdiction. In the case of *Winn vs. Scott*, we said, "that the expressions of the Code of Practice seem to embrace all possible cases, but that the authority there granted, must be considered in relation to the constitution, which allows this court appellate jurisdiction only; and its mandates must be confined to matters which have a tendency to aid that jurisdiction." 2 *Louisiana Reports*, 88.

We cannot interfere with the orders or interlocutory judgments of the inferior tribunals, which do not work an irreparable injury, or involve matters which may affect our appellate jurisdiction.

The plaintiff should take nothing by his motion.

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ADDISON VS. NEW-ORLEANS SAVINGS BANK.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The proceedings of the Probate Court, where the succession of the deceased was opened and administered, recognizing the heir, together with the testimony of witnesses well acquainted with the family, are sufficient to authorize the heir to sue and maintain an action in his own name, for debts owing the succession.

The lawful heir inherits the succession from the moment it is opened and this right is acquired by the operation of law, alone, before he has taken any steps to put himself in possession.

One of the effects of the right of the heir to a succession, is to authorize him to institute all the actions which the deceased had a right to, and to prosecute those already commenced.

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claim the estate. And when it is shown, the deceased had no forced heirs, the nearest collateral relation, as a brother, applying, will be entitled to the succession.

The absence of heirs will not be *presumed* in all cases of an *intestate* succession, and less so in a case where the contrary is shown.

This is an action in which the plaintiff claims a deposit of seven thousand dollars, made in the Savings Bank of New-Orleans, by Mary Amanda Addison, late wife of Nott, on the ground that she is dead, and that he is her only brother and nearest heir. He shows that he has been recognized as the only lawful heir to the deceased, by the Probate Court of the parish of Jefferson, where she died, and where her succession was opened. He prays judgment for the amount of said deposit, and all the accruing interest.

The defendant admitted the deposit, but denied that the plaintiff was heir, and entitled to receive the money.

The plaintiff produced the proceedings in the Court of Probates, recognizing him as heir, and also proved his heirship by witnesses familiar with the family. There was judgment for the plaintiff for the sum claimed, with interest, and the defendant appealed.

M^cKinney, for the plaintiff.

Maybin, contra.

Simon, J., delivered the opinion of the court.

Plaintiff alleges, that he is the only heir and representative of his sister, having been recognized as such by the Court of Probates of the parish of Jefferson, where she died, and that by a decree of the said court, he has been put in possession of her estate. He further states, that some time before her death, she had deposited a sum of seven thousand dollars with the defendants, which he now claims with interest, &c.

Defendants plead the general issue, admit the deposit of seven thousand dollars, and deny the death of the depositor,

and the plaintiff's heirship and relation as by him alleged. They also aver, that the proceedings had before the Court of Probates, are irregular, illegal and void, the same having been had *ex-parte*, and maintain that the plaintiff has no right of action.

The District Court gave judgment in favor of plaintiff, and the defendant appealed.

The only question submitted to our decision in this case, is whether the plaintiff's right of action, as the only heir of his sister, is sufficiently established. For this purpose, he has not only produced proceedings had before the Court of Probates of the parish where the succession was opened, and in which he is recognized to be the brother and only lawful heir of the deceased and authorized as such to take possession of her estate, but he has also proven by several witnesses well acquainted with the family, that she had, at the time of her death, no other heir but the plaintiff. It is, however, contended by defendant, that in order to entitle the plaintiff to recover, he must show that he has been legally authorized to take possession of the intestate succession, contradictorily with a *curator of absent heirs*, to be appointed under articles 1089 and 1091 of the Louisiana Code; that he was himself entitled to the curatorship by article 1114, and that the decree of the Court of Probates, by him produced, is illegal and insufficient, having been rendered *ex-parte*; and they also urge that this defect in the proceedings, or the absence of legal formalities, cannot be supplied by parole proof of his being the only heir, as he must previously be pronounced to be so by the Probate Court of the domicile of the deceased:

If a person dies, leaving no descendants, nor father nor mother, as it has been shown in this case, the law calls to his inheritance his brothers and sisters. *Louisiana Code*, article 908; if there be only one, he becomes the only lawful heir, and inherits the whole succession. The lawful heir acquires the succession immediately after the death of the deceased person to whom he succeeds, and this right is acquired by the operation of the law alone, *before he has taken any step to put himself in possession*; from the moment the

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The proceedings of the Probate Court, where the succession of the deceased was opened and administered, recognizing the heir, together with the testimony of witnesses well acquainted with the family, are sufficient to authorize the heir to sue and maintain an action in his own name, for debts owing the succession.

The lawful heir inherits the succession from the moment it is opened; and this right is acquired by the operation of law, alone, before he has taken any steps to put himself in possession.

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One of the effects of the right of the heir to a succession, is to authorize him to institute all the actions which the deceased had a right to, and to prosecute those already commenced.

It is not necessary, in all cases, to appoint an attorney of absent heirs, and a curator to the vacant estate, contradictorily with whom the heir must claim the estate; and when it is shown the deceased had no forced heirs, the nearest collateral relation, as a brother applying, will be entitled to the succession.

The absence of heirs will not be presumed in all cases of an intestate succession, and less so in a case where the contrary is shown.

succession is opened, *le mort saisit le vif*, and the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession. *Louisiana Code, articles 934, 935 and 936.* One of the effects of this right is, to authorize the heir to institute all the actions which the deceased had a right to institute, and to prosecute those already commenced: *Idem., article 939.* It is then perfectly clear, that the plaintiff, who is proven to be the only lawful heir of the deceased, had a right to institute this action, as well as any other, previous to his taking any step to be put in possession of the estate; that there was no necessity for such proceedings before enforcing his right, and that all that could be required of him, was to furnish satisfactory evidence of his right of inheritance. This has been done in this case.

But it is insisted that, the succession of the plaintiff's sister being one *ab intestato*, it was necessary first to cause a counsel to be appointed to the absent heirs, and afterwards a curator, according to articles 1091 and 1204, and that the plaintiff ought to have claimed the succession contradictorily with such curator. This position would be correct, if it appeared that the heirs or part of them were absent, but we are not prepared to understand the law to require the appointment of a curator in all cases; to presume the absence of heirs in all successions, and less so in a case in which the contrary has been shown. 12 *Louisiana Reports*, 80. The Court of Probates received proof of the right of the plaintiff, so did the District Court, and without attempting to inquire into the legality and validity of the decree of the Court of Probates, which we are not allowed to question collaterally in this suit, particularly with the defendants who have no interest in the succession, we are of opinion that the plaintiff has proven all that he was required by law to show, and that the judge *à quo* did not err in giving judgment in his favor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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ON AN APPLICATION FOR A MANDAMUS.

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The imprisonment of the debtor at the instance of a creditor, on a charge of fraud, under the tenth and eleventh sections of the act of March 20, 1840, abolishing imprisonment for debt, is essentially a civil suit by creditors against their debtor, to prevent the abstraction of his property, and in which an appeal lies.

So, an appeal lies from an order or judgment, on a rule discharging a debtor from arrest and imprisonment, under the act abolishing imprisonment for debt.

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This is an application for a *mandamus* to the judge of the Parish Court of New Orleans, commanding him to grant an appeal from an order or judgment discharging a debtor from imprisonment under a writ of *habeas corpus*, in the case of the Citizen's Bank and others vs. A. Maurin.

The Citizen's Bank and several others, presented their joint petition, alleging they were creditors of the firm of A. Maurin & Co., in the aggregate sum of eighty-eight thousand one hundred and sixty-five dollars, and had instituted suit therefor in the Parish Court, against Antoine Maurin, sole liquidating partner of said firm, and also charging said defendant with fraud, in having sold a great portion of his real property and slaves, to the prejudice and in fraud of his creditors; that upon these facts being alleged they obtained an order of arrest; the said A. Maurin was arrested and imprisoned under the provisions of the tenth and eleventh sections of the act abolishing imprisonment for debt, until he gave bond and security in the sum of ninety thousand dollars.

On the first of June, 1840, Maurin's counsel took a rule on the plaintiffs to show cause why the order of arrest should not be set aside, on the ground that the affidavit is insufficient to hold to bail. This rule, on hearing the parties, was made absolute, the order of arrest set aside, and a writ of *habeas corpus* issued, on which the defendant was brought up and discharged. The plaintiff then prayed for a suspensive appeal,

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from the orders or judgments setting aside the order of arrest and releasing the defendant.

The parish judge refused the appeal, being of opinion that imprisonment, under the new act abolishing imprisonment for debt, is a criminal proceeding; that the act is a *criminal law*, and, according to the showing of the plaintiffs, the acts complained of were committed by their debtor before the passage of the law; and that with regard to him, it is an *ex post facto* law, and cannot be constitutionally enforced.

The plaintiff now took a rule in this court on the parish judge, to show cause why a peremptory *mandamus* should not issue, commanding him to allow the appeal prayed for in this case.

Grima, for the application, presented the petition of plaintiff and urged the issuing of the *mandamus*; this being an appealable case.

Preston and *Canon*, resisted the application. They contended that the proceeding was a criminal one. That the debtor was required to stand his trial for the fraud charged, and if found guilty, to suffer the punishment prescribed in the law. That he should be condemned as a convict, for defrauding his creditors, to three years imprisonment. From criminal proceedings, no appeal lies.

Judge Maurian, showed for cause: That this case is not one in which an *appeal lies*, according to law; and refers to his judgments in the case for the grounds and reasons of the refusal of the appeal, as prayed for.

"The first ground upon which this rule is taken, is that the affidavit is insufficient to hold to bail.

On the first ground, the court is clearly of opinion, that the order of arrest complained of is widely different from an order of arrest, or order of bail, as it is generally termed in practice, as defined and explained in article 210 of the Code of Practice, the latter being allowed only in cases of intended departure by the debtor; whereas, the former is a remedy

of an entirely new species. The law creating this new remedy has not even required an affidavit, and the court, in requiring one in the case at bar, has only been actuated by a desire of affording greater security for the person of the debtor.

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The second and third grounds, which will be examined together, are that the order of arrest is illegal, and that defendant is not liable to be arrested on the showing of plaintiffs, and that their other proceedings are illegal and oppressive.

Upon the two grounds, the court has been favored by most able arguments on both sides, a thing which was highly desirable, inasmuch as the act of 1840, abolishing imprisonment for debt, under which the proceedings in this case arose, being of but recent date, and operating great changes in our legislation, the court could derive no aid from any preceding jurisprudence.

The plaintiff in the rule contends, that the order of arrest is illegal, because the provision of the law of 1840, under which the proceedings were had, are not applicable to acts done before the passage of the law; and that, with regard to acts complained of in the plaintiff's petition, it is an *ex post facto* law, and, as such, unconstitutional.

That the acts complained of were done anterior to the passage of the law, is positive, and results from the very allegations in the petition; indeed, it is admitted at all hands. But, can the law in question be said to be one *ex post facto*?

The definition of an *ex post facto* law has not been the subject of discussion. It is well understood, and it is further admitted at all hands, that only such *ex post facto* laws are prohibited by the constitution as are of a criminal or penal nature.

Now, are the provisions of the law of 1840, under which the present proceedings have been instituted, of a criminal or penal nature?

Every law that defines a crime or offence, and affixes a punishment to the commission of such an offence, is a criminal law.

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In the act of 1840, now under consideration, the 10th section defines a new class of offences, under the denomination of fraud; and the 13th section, enacts a punishment upon a conviction of any of the offences mentioned in the 10th section.

That a civil remedy is mingled with the punishment of the offence, does not deprive that law of its criminal character.

It has been contended in argument by the plaintiff's counsel, that the legal provisions, above referred to, partake no more of the nature of a criminal law than the legal provisions of the act of 1817 and 1808, relative to frauds committed by insolvent debtors; but I think there exists between them a wide difference. Under the law of 1817, a debtor who makes a surrender of his property to his creditors, for the purpose of avoiding to go to jail, and who is found guilty of fraud, is deprived of a benefit which the law allows only to honest debtors. He is merely deprived of a benefit for which he had himself applied; he is not, in fact, condemned to imprisonment, but he is merely left subject to the imprisonment to which he was subject before. Under the law of 1808, a debtor who is actually imprisoned for debt, and who asks to be liberated, if he be found guilty of fraud, is not condemned to be imprisoned, but the law does not take him out. Under both these laws, debtors guilty of fraud are merely deprived of a favor or a benefit for which they apply, and left in the situation in which they were before their application. But even then, their creditors can discharge them, either when they are paid of their debt, or if they choose to exonerate their debtor from the payment. Not so, however, under the tenth, eleventh and fifteenth sections of the act of 1840. Here the debtor applies for no favor or benefit, but his creditors arrest him, not because he owes a debt, but because he has committed fraud. He is tried, and if found guilty, the court is bound to condemn him to an imprisonment for a period not exceeding three years. Nor is it in the power of this creditor, except in one case specially provided for, to discharge him from imprisonment after sen-

tence. The imprisonment, therefore, is evidently the punishment which the public inflict, for the commission of the crime of offence of fraud. If this reasoning be correct, the law under consideration is a criminal or penal law. In order to be constitutional, it can only provide for what happens posterior to its passage; every act which, anterior to its passage, was not susceptible of punishment, cannot be punished in consequence of its provisions, for with regard to all such acts, it would be *ex post facto*, and as such, unconstitutional. In the case before us the acts complained of, and which are of the nature of those repealed by the 10th section of the law of 1840, are by the very showing of the plaintiff's petition, anterior to the passage of the law. Then with regard to them, that law is *ex post facto*, and being *ex post facto* cannot be constitutionally enforced."

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Martin, J., delivered the opinion of the court.

The Citizens' Bank, and other creditors of the firm of A. Maurin & Co., presented a petition to the Parish Court, alleging that Antoine Maurin, as the liquidating member of said firm, in violation of an agreement made with the creditors, has sold lots of ground, slaves and stock, to Benjamin W. Lawes, of Donaldsonville, in this State, and keeps the money or proceeds of said sales concealed from the creditors; and that he is in possession of a large amount of money, notes and effects of said firm, which he also controls and conceals, with a view to defraud his creditors; that the sales made to Lawes, are simulated and fraudulent, and intended to cover his property from his creditors, the petitioners in this case.

They further allege that Antoine Maurin, although in failing circumstances, has not voluntarily surrendered his property to his creditors; and that, according to the provisions of the 10th and 11th sections of the "Act to abolish imprisonment for debt, approved the 20th March, 1840," he is guilty of presumptive fraud, and liable to arrest, at the instance of these petitioners. They pray that he be arrested accordingly, and that Benjamin W. Lawes be cited; and

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that the sales to him of the slaves and other property, be annulled and declared void, as made in fraud of creditors.

Upon this petition, and affidavit made thereto, the defendant, A. Maurin, was arrested and imprisoned.

A rule was taken on the plaintiffs, to show cause why the order of arrest should not be set aside, and the defendant discharged. On hearing the parties, the rule was made absolute, and the order of arrest set aside. A writ of *habeas corpus* issued, and the defendant was brought up and discharged. From this judgment, the plaintiffs prayed an appeal.

The parish judge refused the appeal on two grounds: 1. That the proceedings, to set aside the order of arrest and liberate the defendant, was a criminal case, in which there was no appeal. 2. Admitting it to be a civil case, the judgment on the rule was merely interlocutory, working no irreparable injury, and from which no appeal lay. The plaintiffs have applied to this court for a *mandamus*, to compel the parish judge to grant an appeal.

On a rule to show cause why the *mandamus* should not issue, the judge has referred us, for the reasons on which he grounds his refusal to allow the appeal, to those which are contained in his former opinion.

The defendant, A. Maurin, was arrested under a charge of having made a conveyance or transfer of his property, with a view to prejudice and defraud the petitioning creditors; was ordered to give bond according to the provisions of the tenth and eleventh sections of the act abolishing imprisonment for debt; and, on his failure or refusal, was committed. His imprisonment was, therefore, in a civil suit, at the instance of several of his creditors. Their object was to avert an injury which they apprehended from his alleged fraudulent conveyance. It is true, if the fraud was found by a jury, he might be condemned to imprisonment for three years; unless, having been found guilty only of conferring an unjust preference to other creditors, he satisfies and repairs the injury of the complaining creditor. Further, if the jury find him guilty of absolute fraud, he is to be condemned to

unconditional imprisonment for three years. It has been contended that the latter circumstance gives to the present suit the character of a criminal one, in which there is no appeal. We are of opinion the parish judge erred, in considering the case in that light. It is essentially a civil suit, instituted by creditors against their debtor, for the purpose of preventing the abstraction of his property. The imprisonment of his person until after the trial, will have the effect to induce him to do justice to his creditors, in order to prevent his final imprisonment for three years. His discharge must deprive them of this advantage.

2. As to the second ground assumed by the parish judge, that if this was a civil case no appeal would lie, because the judgment is merely interlocutory, and works no irreparable injury; we think that the injury which the creditors apprehend is irreparable by a judgment which they may obtain in the Parish Court. This authorized them to appeal; and was so held in the cases of *Prampin vs. Andry*, 4 *Martin*, 315; *State vs. Judge Lewis*, 2 cases, 9 *idem.*, 301, 302.

Let a *mandamus* issue, commanding the parish judge to grant an appeal from the judgment setting aside the order of arrest; and from judgment discharging the defendant, Maurin, on the writ of *habeas corpus*.

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The imprisonment of the debtor at the instance of a creditor on a charge of fraud, under the 10th and 11th sections of the act of March 20, 1840, abolishing imprisonment for debt, is essentially a civil suit, by creditors against their debtors to prevent the abstraction of his property, and in which an appeal lies.

So, an appeal lies from an order or judgment on a rule discharging a debtor from arrest and imprisonment under the act abolishing imprisonment for debt.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
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All the parties who are endorsers on a note or bill, after the payee, must be governed in their liabilities by the *lex mercatoria*.

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The law and responsibility is the same between endorsers, whether they received the note or bill successively from each other, in the usual course of business, or are mere accommodation endorsers.

So, where the second endorser takes up a note after protest, he has his recourse against the first endorser, for the amount he has paid.

This is an action on a promissory note, executed by George Green, for two thousand five hundred dollars, the 25th January, 1837, payable to S. W. Oakley, three years after date, by him endorsed in blank. The plaintiff was the second endorser, when the note was put in circulation, and at maturity it was protested for non-payment. He paid it under protest, and now seeks to recover the amount and costs from the defendant who was the payee and first endorser.

The defendant admits his endorsement, but denies that he is in any manner liable to the plaintiff. That it was given for the purchase of a tract of land or lot of ground to which the plaintiff, with himself, was a party. That the note was given as accommodation paper; the plaintiff, defendant, Green and R. Curell, being all associated together in the purchase of said property from L. Peirce, Esq., and that he cannot be liable for more than his proportion; but that Green having become insolvent, he has already paid more. He sets up various other matters in defence, and pleads the want of an amicable demand, and prays that the suit be dismissed. On these pleadings and issues the cause was tried.

After hearing the evidence and arguments of counsel, the parish judge decided, that this case must be governed by the *lex mercatoria*; and that the payee and first endorser was liable to the second and subsequent endorser; and that there is no distinction between business and accommodation paper. See 4 Louisiana Reports, 466. There was judgment for the plaintiff, and the defendant appealed.

Wharton, for the plaintiff, contended, that judgment should be affirmed.

1. Because the note is to be considered under the general principles governing promissory notes and bills of exchange,

unless there is evidence to show that it was not so intended, and that the endorsers agreed that they were to be to each other as sureties. There is no such evidence, positive or implied. See *Stone et al. vs. Vincent*, 6 *Martin*, N. S., 517; *Knox vs. Widow and heirs of Dixon*, 4 *Louisiana Reports*, 466; *Church vs. Barlow*, 9 *Pickering's Reports*, 547.

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G. B. Duncan, for the defendant, insisted, that where a party puts his name on a note, as in this case, for the use and benefit of the maker, he will be presumed to have done so as surety. 14 *Louisiana Reports*, 389.

2. The case of *Vincent vs. Stone*, 6 *Martin*, N. S., 517, is a very different case from this. If Green had been the sole purchaser, and the plaintiff and defendant had endorsed for him, there is no doubt they would have been liable in the usual way, one to the other; the first to the second, &c.; but here the parties were all joint purchasers, and as such are only jointly liable, and must be so treated as between each other. The judgment ought, therefore, to be reversed. See the cases of *Nolle & Co. vs. Their Creditors*, 7 *Martin*, N. S., 9; *Dorsey et al. vs. Their Creditors*, *idem.*, 498.

Morphy, J., delivered the opinion of the court.

This action is brought on a promissory note, by the endorsee against the payee and endorser thereof. There is no dispute about the signatures, the demand on the drawer, or notice to the endorser; but the latter sets up for defence, that the note sued on was not negotiated by him to the plaintiff, in the usual course of business; that the plaintiff and himself were both accommodation endorsers for George Green, the drawer; that the plaintiff, defendant, Green and Curell, having bought jointly, on speculation, from Levi Peirce, a tract of land, the deed of sale was executed in the name of Green alone; but that each of the co-purchasers gave his notes for his proportion of interest, endorsed by some of the other purchasers; that having both, in this way, endorsed the notes of Green, they should be viewed in the light of co-sureties; and that plaintiff having taken up and paid

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this note, cannot claim from the defendant more than one-half of its amount. Judgment was given below for the plaintiff, and this appeal was taken.

The appellant has contended, that under the decisions of this court, we can look beyond the form in which the parties may have clothed their contract; and we have been referred to the cases of *Nolte & Co. vs. Their Creditors*, and *Dorsey & Co. vs. Their Creditors*, both reported in 7 *Martin, N. S.*, 9 and 498. That we are authorized to inquire into the real character of a contract in whatever form presented to us, we have never doubted; nor has it to our knowledge been disputed. In the cases quoted, we have held that even where a contract assumed the form of a bill of exchange or promissory

All the parties who are endorsers on a note or bill, after the payee, must be governed in their liabilities by the *lex mercatoria*.

The law and responsibility is the same between endorsers, whether they received the note or bill successively from each other in the usual course of business, or are mere accommodation endorsers.

So, where the second endorser takes up a note after protest, he has his recourse against the first endorser, for the amount he has paid.

note, the mercantile law did not enable the payee, or whoever may have lent his name to the maker, or drawer, to recover from either more than he was compelled to pay himself; but in the same decisions, we have said that as to all parties who came after the payee on a bill, the *lex mercatoria* applied in full force; and made him responsible under its rules. The law is the same, says Bailey, page 151, whether the endorsers received the note successively from each other in the course of business, or they are merely accommodation endorsers for the benefit of another person. When parties obligate themselves in a certain form, they must be presumed to have intended to contract the obligations which that form imposes, unless an understanding to the contrary is shown; 4 *Louisiana Reports*, 469; *Knox vs. Dixon's Heirs*. In this case, they both endorsed the note in the usual manner and form, and no agreement is shown which might vary the legal liabilities their endorsements must necessarily create.

The circumstance of the note thus endorsed having been given by Green to his vendor, in payment of his interest in the joint purchase, may show that these endorsements were an accommodation to the drawer, but does not show their intention to be bound, otherwise than that they must have known that their endorsements would bind them, by the well established principles of law operating upon them under such relations.

It is therefore, ordered, that the judgment of the Parish Court be affirmed, with costs.

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ZACHARIE.

BLANCHARD VS. ZACHARIE.

APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

A return of *nulla bona* as to one of two defendants, against whom a writ of *feri facias* has issued, and the writ being stayed as to the other, a separate *ca. sa.* cannot legally issue. The execution must conform to the judgment, which is the sole authority that warrants the process. There being but one judgment, there can be but one execution and satisfaction.

So, where a judgment *in solido* is obtained against three defendants, and separate executions issue, but stayed as to one of the defendants, and as to the other two, returned *nulla bona*, and *ca. sas.* are taken out against each of them separately, one of which is stayed, and the other gave bond and security for the prison limits: *Held*, to be illegal, and the surety on the bond discharged: because the plaintiff cannot have, at the same time, a *ca. sa.* against one, a *fi. fa.* against a second, and proceedings suspended as to a third.

This is an action against the surety in a prison limits bond, to satisfy a judgment which the plaintiff had obtained against Puech & Duplessis, and another defendant; in which Puech had been arrested on a writ of *capias ad satisfaciendum*, which issued separately against him, and he gave bond, with the defendant as his surety for the prison limits. The condition of the bond being broken, the plaintiff instituted this suit against the surety for the amount of his debt.

The defendant admitted his signature to the bond, but denied all the other allegations, and denied, specially, being in any way responsible. He expressly charged, that time

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was given to W. F. C. Duplessis, one of the defendants in the judgment, who was endorser of the notes forming part of the debt; that the proceedings against Puech were illegal and void, and that the bond was also null and void. On these pleadings and issues the cause was tried.

The facts of the case are few and clear, and are fully stated in the opinion of the court.

There was judgment for the plaintiff, and the defendant appealed.

Bodin, for the plaintiff, contended for the affirmance of the judgment. He argued to show that the plaintiff had the right to pursue either of his debtors separately, being each bound *in solido*, and for the whole debt. He relied on *Pothier on Obligations No. 270*, in support of this position, and other authorities.

T. Slidell, for the defendant, insisted on the reversal of the judgment. He pointed out various defects in the proceedings against the defendants in plaintiff's judgment, to show that they were null, and of no effect.

2. He contended that, both by the common law authorities, and the decisions of this court, that execution must strictly follow the judgment of the court; so that a *ca. sa.*, on a judgment against two, cannot be issued against one of the defendants, and proceedings stayed as to the other. The writ must be issued in conformity to the judgment. See the case of *Casson vs. Cureton*, 12 *Martin*, 435.

Bullard, J., delivered the opinion of the court.

The plaintiff, having recovered a judgment against Puech & Duplessis and W. F. C. Duplessis, *in solido*, in the City Court, caused writs of *feri facias* to issue, separately, against the members of the firm and the last named defendant. The execution against the latter was stayed, by order of the plaintiff, upon his giving his notes, with an endorser, for the amount of the judgment against him, payable at different periods, upon condition that the money was not made out of

his co-defendants. Upon the execution against Puech & Duplessis, there was a return of no property found. The plaintiff, thereupon, took out writs of *capias ad satisfaciendum* against each of the members of the firm, separately. The *capias* against Duplessis was stayed, but Puech was arrested, and gave the bond to keep the prison bounds upon which the present suit is brought against his surety. The defendant sets up, as a defence, the irregularity and illegality of those proceedings, and the consequent nullity of the bond. There was judgment against him, and he appealed.

The counsel for the appellant relies mainly upon the decision of this court in the case of *Casson vs. Cureton*, 12 *Martin*, 435.

The principle settled in that case was, that on a return of *nulla bona*, as to one of two defendants, against whom a writ of *feri facias* had issued, and the writ being stayed as to the other, a separate *capias* could not legally be issued; that the mode of execution is not at the discretion or caprice of the plaintiff, but that the execution must conform to the judgment; and that the clerk, in issuing execution, must strictly follow the judgment, which is the sole authority that warrants the process.

It is obvious, that a departure from these principles might lead to the greatest injustice and oppression. Writs of *feri facias*, issued separately against debtors, *in solido*, condemned by the same judgment, would authorize the officers of justice to coerce payment at the same time from each and all of them; whereas, by the judgment, the plaintiff is entitled only to one satisfaction. When the public force is employed in the redress of private wrongs, it should be in strict compliance with judicial authority.

The counsel for the plaintiff very earnestly combats the authority of that case, and relies on that of Pothier, to show that the creditor may pursue either of his debtors, *in solido*, or all at the same time, either by way of action or execution. *Pothier on Obligations*, No. 270. This general principle cannot be denied, so far as it concerns the prosecution of debtors *in solido*, by ordinary action, or by executory process issued

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A return of *nulla bona* as to one of two defendants against whom a writ of *feri facias* has issued, and the writ being stayed as to the other, a separate *ca. sa* cannot legally issue. The execution must conform to the judgment, which is the sole authority that warrants the process. There being but one judgment there can be but one execution and satisfaction.

So, where a judgment *in solido*, is obtained against three defendants, and separate executions issue, but stayed, as to one of the defendants, and as to the other two, returned *nulla bona*; and *ca. sas.* are taken out against each of them, separately, one of which is stayed, and the other gave bond and security for the prison limits:

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Held, to be illegal, and the surety on the bond discharged; because the plaintiff cannot have, at the same time, a *ca. sa.* against one, a *fi. fa.* against a second, and proceedings suspended as to a third.

in the first instance, in the cases in which the law allows such summary proceedings. But when the creditor has sued several debtors, *in solido*, in the same action, and has recovered a judgment, jointly, against them, we are still of opinion that he is bound to proceed, in the execution of it, in the form indicated by the judgment itself, and that he cannot have, at the same time, a *ca. sa.* against one, a *fi. facias* against another, and the proceedings suspended as to a third.

The judgment of the Parish Court is, therefore, annulled and reversed, and ours is for the defendants, with costs in both courts.

COULON vs. CHAMPLIN ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Notice of protest left at the domicile or dwelling house of the endorser, is sufficient.

This is an action on a promissory note, against the endorser. His only defence is want of legal notice of protest. The notary states that "notice of protest was left at his domicile with a colored woman, he not being in, and there being no white person about the premises." There was judgment against him, and he appealed.

L. C. Duncan, for the plaintiff.

Larue, contra.

Morphy, J., delivered the opinion of the court.

The defendant, being sued as endorser of a promissory note, pleaded the general issue. The only point made in

the cause turns on the insufficiency of the notice given to him. The certificate of the notary states, "that notice of protest was left at defendant's domicile with a colored woman, he not being in, and there being no white person in or about the premises" It has been held by this court, that notice of non-payment given to endorsers by leaving it at their dwelling houses, is sufficient. 6 *Louisiana Reports*, 729, *Franklin vs. Verbois et al.* Damages have been prayed for by appellee, and should, we think, be allowed.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, and ten per cent. damages.

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CREDITORS OF SCHOONER CAMANCHE, INTERVENORS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A creditor for supplies furnished a ship or vessel, has a privilege on the vessel, for those furnished *before her departure*, if she has already made a voyage; but this voyage must be considered as made to another port, and a return to the *port of departure*, before it is completed: otherwise, the privilege could never be claimed or enforced.

This is an action to recover the sum of two hundred and forty-nine dollars, which the plaintiff alleges the defendant, Bredall, owes him, and for which he gave his draft on J. A. Merle & Co., and that it was protested for non-acceptance. He prays judgment for the amount of said draft, and that an attachment issue against the property of the said Bredall. The sheriff returned, that he received the attachment the first of November, 1838, and attached the schooner Caman-

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June, 1840. draft was not duly presented for acceptance.

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There were five claims for seamen's wages, on protested orders, for forty-four dollars each, and filed by way of intervention against the schooner, and a further claim of seventy-three dollars put in by the plaintiff.

On the 3d of January, 1839, there was judgment for the plaintiff for two hundred and forty-nine dollars, with interest; and also for all the intervenors against the defendant, to be paid by privilege on the schooner attached. Execution issued, and the schooner *Camanche* was sold on the 23d February, for two thousand two hundred dollars; leaving a balance, after deducting four hundred and seven dollars, sixty-two cents for costs, of one thousand seven hundred and ninety-two dollars, thirty-eight cents.

On the 8th of March, 1839, Victor Wiltz filed his third opposition, and intervened; alleging that the defendant, Bredall, was indebted to him in the sum of nine hundred and seventy-eight dollars twenty-three cents, for which he has a lien or privilege on the proceeds of the schooner *Camanche*; it being for supplies and ship-chandlery furnished said schooner; and that a suit had already been commenced for said claim. The account annexed, shows that the articles comprising this claim, were sold and delivered to the owner of the schooner, between the 5th January and 1st October, 1838. On the same day, Charles Wolfe intervened, claiming five hundred dollars, by privilege on the vessel, for wages and disbursements made as master of said schooner.

On the 14th March, 1839, Zacharie & Brothers also intervened, and claimed five hundred and seventeen dollars, seventy-two cents, by preference and privilege, to be paid out of the proceeds of said schooner, and that they had already instituted suit therefor, by attachment.

At this stage of the proceedings, the counsel for the plaintiff on behalf of the latter, and the claimants for seamen's wages, filed a plea of prescription to the demand of Victor Wiltz, so far as it regards their claim. Zacharie & Brothers put in the same plea, and prayed that their own claim be preferred.

There was judgment allowing the privileged claims of the plaintiffs and intervenors, for wages, &c. amounting to one thousand and twenty dollars, with the first privilege. Second privilege, the claims for supplies; C. Wolfe, forty-eight dollars fifty cents; and V. Wiltz, eighty-one dollars fifteen cents: in all, one hundred and twenty-nine dollars sixty-five cents. These and the above claims, deducted from one thousand, five hundred and ninety-seven dollars, thirty-four cents, the net proceeds of the schooner, after allowing costs and attorney's fee, left a balance of only four hundred and forty-seven dollars, sixty-nine cents, which was ordered to be paid to Zacharie & Brothers, as privileged by priority of their attachment.

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The district judge decided that Wolfe had the privilege of wages for four hundred and twenty dollars; for advances, forty-eight dollars fifty cents; and for the balance, he had only the priority of attachment: that Wiltz had a privilege for supplies furnished subsequent to the 5th February, 1838, at which time the Camanche cleared for Matamoros. After that period she made two voyages; one from New-Orleans to Matamoros, and one from Matamoros to New-Orleans. The supplies furnished subsequent to the 5th February, amount to eighty-one dollars twenty-five cents; for the balance of the claim, Wiltz is privileged by his attachment alone.

Wiltz appealed.

McMillen, for the appellant, showed:

1. Wiltz proves that his claim was for materials and supplies furnished previous to the departure of the schooner Camanche, on her *last voyage*, and after her return; therefore has a privilege for the whole amount of his claim. And the judge erred in deciding that the schooner had made *two voyages*, and, consequently, the privilege lost. The judge says: "The vessel made two voyages; one from New-Orleans to Matamoros, and the other from Matamoros to New-Orleans." There was not two voyages, in any sense of the word voyage.

2. The claims, as classed by the judge from one to eight

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inclusive, are not privileged upon the proceeds of the schooner *Camanche*, and none were prayed or asked for by claimants. They are admitted to be for services rendered on board the schooner *Lodi*.

3. Zacharie & Brothers, have no privilege on the *Camanche*, and none should have been allowed them, especially over the claim of Wiltz.

4. The plea of prescription relied upon by plaintiff and Zacharie & Brothers, is a plea personal to Bredall, and cannot be offered by third persons; besides, the claim of Wiltz is liquidated by judgment, and no prescription can be opposed to it.

5. The documents introduced by plaintiff, as well as the testimony of Wolfe and others, show that Bredall was absent, and could not be sued by Wiltz; therefore, no prescription attaches; as the code expressly gives him a lien until he suffers the vessel to make a voyage at the risk of the new purchaser, &c.

Preston, for the plaintiffs and appellees.

Grirot, for Zacharie & Brothers.

Barillette, for the defendant.

Martin, J., delivered the opinion of the court.

In this case, Wiltz is appellant from a judgment on his opposition to the distribution of the proceeds of the schooner *Camanche*, seized and sold in the present suit. He claims to be paid the sum of nine hundred and seventy-eight dollars and twenty-three cents, for supplies furnished this vessel, at the special instance and request of the captain and owner, for the payment of which he alleges he has a lien or privilege on the proceeds of the schooner now in the hands of the sheriff.

The District Court allowed a privilege for the sum of eighty-one dollars and twenty-five cents, for supplies furnished subsequently to the 5th of February, 1838, the date at which the schooner cleared at New-Orleans, for Matamo-

ros. In the opinion of the district judge, by going to that port and returning to New-Orleans, the vessel made two voyages, and the appellant thereby lost his privilege for the supplies furnished previous to her sailing; and for this balance the court allowed a privilege or priority by the attachment, only, against the defendant as owner of the schooner.

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The counsel for the appellant has contended, that the district judge erred in disallowing his claim to be paid by privilege for the whole of the supplies furnished by him before and after the 5th February, 1838, as above stated. In this, he is clearly supported by the decision of this court, in the case of *Abat vs. Nartigue et al.*, 8 Louisiana Reports, 188.

The district judge, in our opinion, erred, in deciding that the sailing of the schooner from the port of New-Orleans to Matamoros, and back again, constituted two voyages. The Louisiana Code, article 3204, number 8, gives a privilege on the vessel, "to creditors for supplies furnished previously to the departure of the ship, if she has already made a voyage." If this voyage be the outward one only, the privilege expired on reaching Matamoros, or on her departure therefrom; in other words, *after she sailed for Matamoros*, as it could not be enforced at sea.

A creditor for supplies furnished a ship or vessel, has a privilege on the vessel, for those furnished before her departure, if she has already made a voyage; but this voyage must be considered as made to another port, and a return to the port of departure, before it is completed; otherwise the privilege could never be claimed or enforced.

The proceeds of the sale of the schooner in the sheriff's hands amount to two thousand two hundred dollars, and the law charges allowed by the judgment are six hundred and two dollars and sixty-six cents, which deducted, leave the sum of one thousand five hundred and ninety-seven dollars and thirty-four cents, to be divided among the claimants. On this the appellant has a privileged claim for the sum of nine hundred and seventy-eight dollars and twenty-three cents, and C. Wolfe is entitled to be paid also by privilege, the sum of four hundred and sixty-eight dollars and fifty cents, for his wages and disbursements as master of said schooner. These two sums amount to one thousand four hundred and forty-six dollars and seventy-three cents, and when taken from one thousand five hundred and ninety-seven dollars and thirty-four cents, the net proceeds of the

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schooner, after deducting law charges, leaves a balance of only one hundred and fifty dollars and sixty-one cents, to be applied to the payment of the claims of the attaching creditors.

The District Court, in our opinion, erred in giving a preference to the claims of the plaintiff and intervenors, numbered in its judgment from one to eight, as being for seamen's wages, when they have nothing to support them in this preference but their attachments; and also in disallowing the appellant's privilege for his whole claim. The judgment must therefore be reversed: and this court, proceeding to give such judgment as ought to have been rendered in the District Court; it is ordered, adjudged and decreed, that the balance in the sheriff's hands, after paying the law charges as settled by the District Court, to wit: the sum of fifteen hundred and ninety-seven dollars and thirty-two cents, be distributed among the claimants, in the following manner: the sum of nine hundred and seventy-eight dollars and twenty-three cents to be paid to the appellant, Victor Wiltz; and the sum of four hundred and sixty-eight dollars and fifty cents, to be in like manner paid to C. Wolfe; and the remainder amounting to one hundred and fifty dollars and sixty-one cents, after deducting therefrom the accruing costs in both courts since the rendition of the judgment appealed from, to be paid to the plaintiff, Charles Blake, he being the first attaching creditor.

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CREDITORS OF SCHOONER CAMANCHE, INTERVENORS.

ON A REHEARING.

The plea of prescription should be explicit and special, so that the party against whom it is opposed, may be put on his guard, in order to enable him to show that the prescription had been interrupted.

In this case, a rehearing was applied for and granted.

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Preston, for the plaintiffs and intervenors, who are appellees, insisted that the plea of prescription had been overlooked, which was important, as regarded the claim of *Wiltz*, the appellant; and the ground on which the appellees relied for the confirmation of their judgment.

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2. This claim is for supplies and things necessary for the equipment of the vessel, and is prescribed by one year. *Louisiana Code*, 3499. *Wiltz* instituted suit the 4th February, 1839, and the whole bill, except eighty-one dollars, was furnished more than a year before that time; and was consequently prescribed unless acknowledged in writing. *Louisiana Code*, 3500.

3. The plaintiff and intervenors had an interest and the right to plead prescription against their co-creditor, when it was a contest for privileges; and when, if his be allowed, it would deprive them of theirs. *Durnford vs. Clarke's Estate*, 3 *Louisiana Reports*, 202.

4. The plea of absence of the defendant, cannot avail the defence to this plea. His absence does not clearly appear and is of no avail, because his property was constantly here; being the very schooner *Wiltz* was supplying.

Bullard, J., delivered the opinion of the court:

In this case a rehearing was granted, on the suggestion, that a plea of prescription set up by the plaintiff against the claim of *Wiltz* was not considered by the court; whereas it was clearly supported by evidence, except for a small amount. We have again had the case under consideration.

The plea of prescription is in vague terms. It is left doubtful whether it was the intention of the plaintiff and intervenors to avail themselves of the prescription, only so far as it relates to the privilege of *Wiltz*, or generally against his claim. These exceptions ought to be explicit and special. But it is only to the extent that the plaintiff might be affected by the debt of *Wiltz*, that we consider the exception. Beyond that, according to the case of *Durnford vs. Clarke's Estate*, 3

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Louisiana Rep., 202, the other creditors of Bredall had no right to avail themselves of it. *Quo ad*, the privilege of Wiltz to be paid out of the fund to be distributed, other claimants of the same fund had an interest in opposing him, and might well insist that the privilege had been lost by prescription. But if it was their intention to avail themselves of the prescription of one year, under article 3499 of the code, supposing them to have a right to do so, the party against whom the exception is set up, ought to be put on his guard, in order to enable him to show that the prescription had been interrupted.

It is, therefore, ordered, that the judgment first pronounced remain undisturbed.

WALDRON ET AL. VS. TURPIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The signatures and official capacities of public officers, purporting to act as such in foreign countries, must be proved, *when contested* in our courts, as other facts.

There is one exception to the rule, that the signatures and official capacities of public officers of another state must be proved in our courts, and that is in regard to notarial protests of foreign bills of exchange, which exception is made in aid of commerce.

But in cases of promissory notes, in another state, the protests do not make proof of a demand of payment, and are not admissible in evidence, unless the signature and official capacity of the officer making them is attested and proved.

By the commercial law, a notary is not absolutely necessary to make a protest of a note or inland bill, as it is not considered an official act; and if the notary makes it, and is living, the protest is not received as evidence itself, *of a demand*, even if his signature and capacity is undisputed.

This is an action on two promissory notes for five hundred and ninety-three dollars and twenty-three cents, and five

hundred and ninety-five dollars and thirty-seven cents, signed by White, Turpin & Nephew, a commercial firm residing and doing business at Grand Gulf, in the state of Mississippi, dated the 7th April, 1838, payable on the 15th of November and first of December following, to the order of the plaintiffs, at the Grand Gulf Rail-road and Banking Company, in Mississippi, and protested for non-payment at maturity. The plaintiffs pray judgment for the amount of said notes, with eight per cent. per annum interest, according to the laws of Mississippi, together with costs of protest, and that the defendant, Turpin, who is now in New-Orleans, be arrested and held to bail.

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The defendant pleaded the general issue; and avers that he is no way liable to pay said notes; and that one of them has been extinguished by a draft given by him. He prays to be dismissed from said suit.

The principal question on which the whole case turns, is embraced in a bill of exceptions taken by the defendant's counsel to the *admissibility of the protest of the notes in evidence*, to prove demand of payment at the place where made payable, on the ground that the signature and official capacity of the notary or justice of the peace, who purports to have made the protest, *was not, and should be first proved*. The court overruled the exception, and admitted the protests to go in evidence, without such preliminary proof, wherefore the defendant's counsel took his bill of exceptions to the opinion of the court.

There was judgment for the plaintiffs, and the defendant appealed.

Wharton, for the plaintiffs, insisted on the affirmance of the judgment. He contended that, by the commercial law, it was not required to prove signatures or the authority of notaries to protest bills and notes. That in aid of commerce, this preliminary proof was dispensed with.

T. Slidell, for the defendant, argued to show that the judgment is clearly erroneous, from the absence of

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proof of demand of payment of the notes sued on, at the place indicated for payment, being the Grand Gulf Rail-road and Banking Company. The only proof of demand of payment is exhibited by certain acts of protest, purporting to proceed from a notary in Mississippi. The defendant excepted to the introduction of said protests, on the ground that there was no evidence authenticating the signature and capacity of the notary; but the court, as defendant contends, improperly permitted the introduction of said protests. Without proof of demand of payment at the place indicated, there can be no recovery. See the case recently decided by this court. 14 *Louisiana Reports*.

Morphy, J., delivered the opinion of the court.

This action is brought on two promissory notes, dated at Grand Gulf, in the state of Mississippi; drawn to the order of plaintiff, by the firm of White, Turpin and Nephew, of which defendant was a member, and made payable at the Grand Gulf Rail-road and Banking Company, in that state. Defendant pleaded the general issue and novation, as to one of the two notes. Judgment being rendered in favor of the plaintiffs, this appeal was taken.

To prove the demand of payment at the place mentioned in the body of the notes sued on, two documents were offered in evidence, purporting to be notarial protests of the notes. Their introduction was opposed on the ground that no proof had been adduced of the signature and official capacity of the person who made them. This objection having been overruled by the judge, a bill of exceptions to his opinion was taken, to which our attention has been particularly requested.

The signatures and official capacities of public officers, purporting to act as such in foreign countries, must be proved, when contested in our courts, as other facts.

We understand the general rule on this subject to be, that the signature and official capacity of persons assuming the character of public officers in foreign countries, must be proved when contested in a court of justice. The different states of the Union must, we apprehend, be viewed in the light of foreign countries, with regard to each other, so far as their municipal laws, and the individual sovereignty re-

tained by each of them are concerned; and the courts of one state can have, or be presumed to have, no more knowledge of the signature and capacity of the public officers of another state, than of any other foreign country. To the above rule there exists an exception, as regards notarial protests of foreign bills of exchange. It has been introduced in aid of commerce, founded wholly upon the custom of merchants and public convenience; it has been acknowledged and maintained by the courts of law, and such protests receive credit every where, without any auxiliary evidence. We are now asked to extend this exception to the protests of two notes, executed and payable in the state of Mississippi, and to receive such protests as evidence *per se*, of a demand of payment at the indicated place. No adjudged cases have been shown to us, nor have we been able to find any in which the extension contended for has been allowed, nor do we see any good reason why it should. The importance, and almost universal use of bills of exchange as the means of remittances from one country to another; the great commercial facilities they have been found to offer; and the delay and trouble of procuring evidence from distant places, are among the grounds upon which this exception has grown up. They do not apply to promissory notes, or other moneyed obligations, more limited in their circulation and general usefulness to foreign trade.

The record does not show that, by the laws of Mississippi, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the endorers. By the general commercial law, it is well known that the intervention of a notary for such acts is unnecessary. A protest of a note or inland bill by a notary public, is not considered as an official act; and if the notary be living, it is not received as evidence, of itself, of the fact of the demand, even when the signature and capacity of the officer are undisputed. *Bailey on Bills*, 512-516; 8 *Wheaton*, 328, *Nichols vs. Wells*. We are, then, of opinion that the documents objected to are improperly admitted, and do not establish a demand of pay-

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There is one exception to the rule, that the signatures and official capacities of public officers of another state must be proved in our courts, and that is in regard to notarial protests of foreign bills of exchange, which exception is made in aid of commerce.

But in cases of promissory notes, in another state, the protests do not make proof of a demand of payment, and are not admissible in evidence, unless the signature and official capacity of the officer making is attested and proved.

By the commercial law, a notary is not absolutely necessary to make a protest of a note or inland bill, as it is not considered an official act; and if the notary be living, it is not received as evidence, itself, of a demand, even if his signature and capacity is undisputed.

EASTERN DIST. ment at the place mentioned in the notes. Without this, no
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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment as in a case of non-suit; the plaintiffs and appellees paying costs in both courts.

M'DONOUGH vs. CHILDRESS ET AL.

APPEAL FROM THE COURT OF THE THIRD DISTRICT, FOR THE PARISH OF
 EAST BATON ROUGE, JUDGE JONES, OF THE EIGHTH DISTRICT, PRESIDING.

In a possessory action, in order to bring the case within the doctrine recognized in the decision of *Ellis vs. Prevost*, 13 *Louisiana Reports*, 230, the plaintiff must show not only acts of limited and restricted possession, but also to indicate, by legal evidence, the extent and full limits of the property of which he claims the possession.

Where the plaintiff, in a possessory action, fails to show that he possessed actually, to a certain extent and limits, the tract of land he claims, he cannot recover.

It is insufficient, for one who alleges his possession to extend to a large tract of land with well defined limits and boundaries, to prove only acts of possession to a small part or fraction of it.

This is in the nature of a possessory action. The plaintiff alleges that he is the owner, and has been in peaceable possession for many years, of a tract of land fronting on the Mississippi, having regular and defined boundaries, and that the defendants have lately and within a year, entered on said land, digging the soil and cutting timber, and committing depredations thereon. He prays that they be restrained, by injunction, from committing further waste; and that he have judgment quieting him in the possession of the land, and for one thousand dollars in damages.

ON The defendant, Childress, claimed the tract of land in contest, and averred that, as owner, he had been in the peaceable and actual possession, and is still in the actual possession by his tenant; but, that he has been disturbed in the enjoyment and occupancy of his land by the plaintiff's suit; that the injunction has been wrongfully sued out, in consequence of which he has sustained losses and damage. He denies that the plaintiff, previous to his alleged and pretended disturbance, was the real or actual possessor of said land, or for more than two years before. He prays that he be maintained in his possession; that the injunction be dissolved, with damages; and that he be decreed to recover five thousand dollars in damages.

Blount, the tenant, answered separately, and maintained the actual and continued possession of Childress.

Upon these pleadings and issues, the parties went to trial.

The plaintiff showed that he was in possession of the premises in 1827-8, and repaired and kept up the levee, which had broke in 1828. The neighbors testified that he had several negroes there then. After the road and levee were repaired, the plaintiff built a small cabin, and left an old negro man and woman in charge. They remained on the place as late as 1835; but it was more than twenty years since any white person had resided there. The two slaves cultivated a small piece of ground round the cabin, and made some ditches. One of the witnesses states that, by permission of the plaintiff, in 1833, he cut about fifteen hundred cords of wood on this land. The witnesses all stated there had been no one in possession since 1835, until the defendant, by his tenant, Blount, took possession. The plaintiff showed that he had persons living near it, employed as agents to look after the place. The present suit was instituted in October, 1836.

On the trial, the plaintiff's counsel requested the court to charge the jury, that *articles 3405-6 and 7, of the Louisiana Code*, contained an important part of the law by which the jury must be governed; and that the plaintiff, under these articles, was entitled to a verdict if they were satisfied that

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he had once had the actual possession, and had done no act which manifested an intention to abandon possession.

2. If the plaintiff had an agent, charged with the care and superintendence of the premises, living near it, and the defendants were warned by this agent not to take possession, then the actual possession of the plaintiff, up to the time the defendants took possession, the verdict should be for him.

3. That possession, by a slave of the plaintiff, was sufficient to retain his actual possession. The judge declined to charge, as requested, and a bill of exceptions was taken. There was a verdict and judgment for the defendants, and the plaintiff appealed.

R. N. and A. N. Ogden, for the plaintiff.

Strawbridge, on the same side.

Preston and Penn, for the defendants, maintained that:

1. The plaintiff cannot maintain his possessory action, because no white person lived on the land for twenty years before the institution of the suit.

2. He kept two negroes there, without a free manager. This was a violation of our penal laws, and cannot give him the rights of a possessor. If it did, it would give him the right of possession only to a negro hut, worth at most ten dollars, and to a negro's *patch*, but not to about twelve hundred superficial arpents of land on the Mississippi, adjoining Baton Rouge. 1 *Moreau's Digest*, page —.

3. The last negro was removed from the place in August, 1835; this suit was commenced more than a year afterwards, on the 12th of October, 1836.

4. The possessory action cannot, therefore, be maintained; because the plaintiff had not the real and *actual* possession of the property, for more than a year before the institution of the suit.

5. The *Louisiana Code*, article 3389, gives the general definition of possession. The next article, 3390, divides it into two species, natural and civil. The next two articles, 3391

and 3392, give clear and distinct definitions of these two species of possession; and the two following articles, 3393 and 3394, present again the same clear distinction, which is so obvious in itself, and expressed in such plain language, that every mind at once comprehends it.

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6. The Code of Practice, following up this clear distinction, gives the possessory action to the one species of possession, and denies it to the other. *Article 49.* The reason is obvious; it is given to redress a *physical* injury, and to prevent the violence which would otherwise take place; whereas, a disturbance of *mere* legal possession does not produce danger of violence, nor require so prompt an action to redress it. The obvious remedy in the latter case, is the investigation of the legal rights of the parties, and the settlement of their whole dispute in a *single*, instead of *two* suits.

Such, at all events, are the dictates of our code; and whether wise or foolish, it is the sacred duty of the court to enforce them. And, keeping the above clear distinctions in view, while reading the whole reasoning of the court in the case of *Ellis vs. Prevost and others*, your honors will see the palpable fallacy of that reasoning, and that this court erred in coming to the conclusion to give the possessory action to a *mere civil or legal* possession, when the law contained in the 49th article of the Code of Practice, expressly denied it.

7. The article 3406, of the Civil Code, was strenuously insisted on in argument, as destroying the distinction between natural and civil possession, on the ground that the possession mentioned in it was clearly a natural possession; while the mere reading, article 3392, shows that it is the identical possession defined in that article as a civil possession, and not the natural possession defined in the preceding article.

Nothing can mar the harmony, the beauty and excellence, of our codes on this subject, but misapprehension; and I pray your honors not finally to nullify the 49th article of our Code of Practice, and throw the actual possessor of our soil open to eviction, not on proof of title, but of long since for-

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June, 1840. possession described in article 2455 of the Civil Code.

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Simon, J., delivered the opinion of the court.

Plaintiff sues to recover the possession of a certain tract of land situated in the parish of East Baton Rouge, which he describes in his petition to contain about fourteen arpents in front, by the depth of eighty, bounded on one side by Duplantier, and on the other by Beauregard. He states that he has been in the peaceable possession of said tract for many years, and that the defendants have lately disturbed him in his said possession. Defendants joined issue by alleging an adverse possession for more than one year. The case was submitted to a jury who found a verdict in favor of the defendants, and after an unsuccessful attempt to obtain a new trial, the plaintiff took the present appeal.

The facts established by the evidence show that the plaintiff, several years ago, took possession of the land in dispute, by repairing the roads and levees that existed upon it, and left there two slaves in charge of one of the witnesses; that a small house was built on the land in 1829 or 1830, in which the slaves lived; that they cultivated a small garden and cornfield, and were yet on the land in 1835. It is further shown, that in 1835, one of the slaves died, and the other became so sick that it became necessary to remove him to New-Orleans; since then, no one has been in the possession of any part of the land for the plaintiff, and at no time for twenty years, has any white person been living upon it.

In a possessory action, in order to bring the case within the doctrine recognized in the decision of *Ellis vs. Prevost*, 13 Louisiana Reports, 230, the plaintiff must show not only acts of limited and restricted possession, but also to indicate by legal evidence the extent and full limits of the property of which he claims the possession.

With this unsatisfactory evidence before us, the plaintiff contends that having originally had the corporeal possession of the land for more than one year, a subsequent civil possession is sufficient to entitle him to recover, and he relies particularly on the case of *Ellis vs. Prevost*, 13 Louisiana Reports, 230: we are not ready to say that the plaintiff has made out such a case as to come under the application of the doctrine recognized in that decision. It was undoubtedly necessary for him to show not only acts of limited and restricted possession, but also to indicate by legal evidence the

extent and full limits of the property of which he claims the restitution. In his petition, he sues for the possession of a tract of land by certain metes and bounds which he describes, and no evidence of any kind has been offered to establish the origin of his possession by virtue of any right or title to any definite quantity; the proof by him furnished does not even go so far as to ascertain what specific portion of the land was enclosed and cultivated by his slaves, and unless we take for granted the allegations contained in the petition, the plaintiff has entirely failed in one of the requisites of the law to institute and maintain a possessory action, to wit: that he possessed *as owner*, to certain extent and limits, the tract which he seeks to recover the possession of. *Code of Practice, article 47.* It is clearly insufficient for one who alleges his possession to extend to a large tract of land, with well defined limits and boundaries, to prove only acts of possession to a hundredth or any other fraction of it; he must show also, by legal and satisfactory evidence, that he possessed corporeally, or actually, the small part as owner of the whole.

The imperfect state of the evidence adduced by plaintiff in support of his possessory action, renders it unnecessary for us to examine the bill of exceptions taken to the charges of the judge *a quo*, to the jury; as, supposing that we should be disposed to say that he has erred in his said charges, the result would still be the same; since, in our opinion, the plaintiff has not made out his case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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Where the plaintiff in a possessory action fails to show that he possessed actually and to a certain extent and limits, the tract of land he claims, he cannot recover.

It is insufficient for one who alleges his possession to extend to a large tract of land with well defined limits and boundaries, to prove only acts of possession to a small part or fraction of it.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

It is only from the *forced heirs* that a universal legatee is bound to demand the delivery of the property bequeathed to him; and if there be no such forced heirs, he is seized of right of the estate, and no demand is required. So, the universal legatee under a will, and universal donee under a marriage contract, are, by mere operation of law seized of the whole estate, and no demand whatever is necessary from the heirs at law. So, where the husband and wife in their marriage contract, made to each other mutual and reciprocal donations of the whole of each other's property, to *vest in the survivor*, on the death of the wife the husband became the universal donee, and seized of her whole estate.

On the 14th May, 1839, Mrs. Miriam Fowler, late wife of George W. Boyd, died in the city of New-Orleans, and on the 20th of the same month, Mr. Boyd presented his petition to the judge of probates, praying that an inventory be made of his deceased wife's property, and that he be put in the possession of the same, in virtue of the following clauses in their marriage contract.

"1. There shall be no community or partnership of acquests and gains between the parties who do hereby formally exclude them from said community."

2. Enumerates the wife's property.

3. The intended wife retains the administration of all her property, and she obligates herself to supply the family.

4. The intended wife declares, that in case the said future husband survives her, she hereby makes in his favor a full and entire donation of all the property, either moveable or immoveable, that she may die possessed of. "To have and to hold said property to himself forever; which donation he hereby accepts."

5. "The future husband declares, that in case the future wife survives him, he hereby makes in her favor full and complete donation of all the property he may have at his

demise; to have and to hold said property to her and her heirs forever, which donation is by her accepted."

The husband is put in possession, as the owner of all the property left by his late wife, according to the provisions of the marriage contract between them.

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On the 24th May, 1839, Henry W. Fowler and others, nephews and nieces of the deceased Miriam Fowler, and who claim to be her heirs at law, took a rule on G. W. Boyd, the surviving husband, to show cause why the order of the Probate Court, putting him in possession of his deceased wife's estate should not be rescinded, on the ground that it is illegal, and was rendered unadvisedly. The plaintiffs, in this rule made proof of their heirship.

On the trial, after hearing the parties, the probate judge was of opinion that it would be a violation of the principles and practice of our courts to have the important questions of law, involved in this case, settled in this summary way. The rule was dismissed, and the plaintiffs appealed.

Hennen and Conrad, for the plaintiffs and appellants.

1. The court, *a qua*, erred in putting the surviving husband in possession of the estate of his deceased wife, she having died intestate, and having left collateral relations who are seized of her estate. *Louisiana Code, articles 908, 911, 934, 935, 936, 938, 939.*

2. The judgment in this case should have quashed the order putting the husband in possession on the mere suggestion of their being lawful heirs. The heirs are seized of the estate, from the moment of the death of the ancestor, and the husband of the deceased should have claimed it from them, when his rights could have fairly been contested and examined.

Preston, for the defendant.

1. On the rule, the court took into consideration the merits of the controversy between the plaintiffs and defendant, and gave judgment against the plaintiffs in the rule, on the ground that the reciprocal donation in the marriage con-

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tract gave the deceased wife's estate to her surviving husband, and that the collateral heirs were deprived of the inheritance by the donation, or to use the words of the judgment, "that the deceased had left no succession to which the plaintiffs are entitled."

2. The reciprocal donations contained in the marriage contract were made in pursuance of article 2316, of the *Louisiana Code*, giving to the husband and wife, power, by their marriage contract, to make, reciprocally, or one to the other, in consideration of their marriage, every kind of donations, according to the rules and under the modifications prescribed in the title of *donations inter vivos*, and *mortis causa*. The same power is expressed in article 1736, of the code.

3. The idea has also been suggested, that the donation in controversy amounts to a donation *mortis causa*, and can only be made in the form of a testament : Code 1563. The article 2316 makes an exception to article 1563, in favor of a particular contract on a particular occasion.

Morphy, J., delivered the opinion of the court.

Miriam Fowler, the legitimate wife of George W. Boyd, having died intestate, and without forced heirs, her husband made application to the Court of Probates, to be put in possession of all her estate. He showed that, by his marriage contract with his late wife, they had made to each other a mutual and reciprocal donation of the whole of each other's property, to vest in the survivor, at the death of either of them. The judge granted the prayer of the petitioner, after requiring of him good and sufficient security, in pursuance of article 925, of the *Louisiana Code*. The nephews and nieces of the deceased then took a rule on the defendant, to show cause why the order putting him in possession of all his wife's property, should not be rescinded and set aside, on the ground that it was illegal, and had issued improvidently. This rule having been discharged, the plaintiffs have appealed.

They contend that, as the lawful heir succeeds by mere operation of law, they, being the nearest heirs at law of the deceased, were of right, seized of her estate the very moment she died; that, there being no last will of the deceased excluding them from her succession, they must be presumed to be entitled to her estate, until some one shows a better title to it than themselves; that, admitting the universal donation contained in the marriage contract, to be valid, it only entitles the donee to claim the estate from them as the lawful heirs, but does not make him an heir, or justify the order by which he was sent into the possession of the estate. They rely on the Louisiana Code, articles 908, 934, 935, 936, 941, 1563, 1454 and 1455.

The arguments of the appellants seem to proceed on the idea that lawful heirs alone become seized of an estate on the death of a testator. The same article, (934) however, which lays down the rule "*le mort saisit le vif*," with regard to the lawful heirs, provides that this rule refers as well to testamentary heirs, as to instituted heirs and universal legatees, but not to particular legatees; and articles 1600 and 1502, provide, in substance, that it is only from the forced heirs, that a universal legatee is bound to demand the delivery of the property bequeathed to him; and that, if there be no such forced heirs, he is seized of right of the estate, and is under no necessity of demanding the delivery of the same. It is clear then, that had Boyd been instituted universal heir or legatee, by a last will of his wife, he would, by mere operation of law, have been seized of her whole estate, and no demand whatever, from the heirs at law, would have been necessary. Such being the rights and privileges conferred by law on a universal legatee, under a last will and testament, we see no good reason why they should not belong to a universal donee under a marriage contract. The rights and liabilities of both should be the same: both are donees *per modum universitatis*; both are to receive after the death of the donor; both hold under the will of the latter; expressed, it is true, in different forms, but alike authorized and sanctioned by our laws. Louisiana Code, articles 2316, 2308,

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It is only from the forced heirs that a universal legatee is bound to demand the delivery of the property bequeathed to him: and if there be no such forced heirs he is seized of right of the estate, and no demand is required.

So, the universal legatee under a will, and a universal donee under a marriage contract, are, by mere operation of law, seized of the whole estate, and no demand whatever is necessary from the heirs at law.

So, where the husband and wife in their marriage contract, made to each other mutual and reciprocal donations of the whole of each other's property, to vest in the survivor; on the death of the wife the husband became the universal donee, and seized of her whole estate.

EASTERN DIST. 2306, 1732, 1519, 1736, 1739; *Jurisprudence du Code Civil*,
 June, 1840. vol. 9, page 95; vol. 15, pages 233, 265.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT, FOR THE PARISH OF
 POINTE COUPEE, JUDGE NICHOLS, OF THE SECOND DISTRICT, PRESIDING.

An act of sale passed before the commandant of Point Coupée, in 1774, in presence of two witnesses, wherein it is stated that the *vendor did not sign it, because he did not know how to write*; but it is mentioned that the title was delivered to the vendee, who took immediate possession of the land, possesses the requisites of an *authentic act*, under the Spanish law.

Parole sales of immoveables have been repeatedly recognized under the Spanish law; and at that remote period, the *ordinary mark* of a party to an authentic act was not required.

Parole evidence is good to prove facts and circumstances of possession at a time when plaintiff's title was unknown, and when the parties could not be suspected of making evidence for themselves.

The acts and authority of a commandant, putting a settler in possession of a part of the public domain, by a written permission or grant, showing the extent of the tract conceded, and accompanied by proof of occupancy, will be considered *prima facie*, a good and sufficient title. The acts of an officer to whom a public duty has been assigned, are *prima facie*, taken to be within his power and authority.

It is historically known that the Spanish government never contested the validity of grants made by the French officers before the Spaniards took possession of the colony of Louisiana in 1769.

The possession of an usurper, or person under a defective *mesme* conveyance and who is evicted, will not interrupt prescription, as against the rightful proprietor, when they both claim under the same original title.

Where the original possessor was in good faith, although an intermediate possessor of the premises held in bad faith, the subsequent possessor in good faith can avail himself of the prescription applicable to such possession.

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If the possession has commenced in good faith, and if it is afterwards held in bad faith, that will not prevent prescription, even if the possessor's title was fraudulent, and he knew another person had a better title.

To support the long prescription of thirty years, possession only, without title or good faith, is necessary: but continuous and uninterrupted possession, under a legal title derived from the original grantee, with certainty in the object and good faith in the first and subsequent possessors, will support the prescription of ten years.

Where the possession has not always been a corporeal one, but when it is necessary to complete a possession already begun, the civil possession will suffice.

This is a petitory action. The plaintiff alleges that he is the owner of a tract of land situated in the parish of West Baton Rouge, on the west bank of the Mississippi, having forty arpents in front, by the depth of forty, which he purchased from the heirs of Wm. Conway, deceased; that said tract of land was originally granted, in three different portions, to said Conway and his two uncles, by the Spanish Government, who afterwards acquired all their right, title and interest in the same.

The plaintiff further shows that the defendant, C. A. Choppin, E. G. Collinsworth, B. F. Joy, and C. Blackman, illegally took possession, and claim to be owners of said tract of land, and continue to withhold the same from him. He prays for judgment, condemning the defendants to deliver up the premises to him, and for rents, profits, and damages; and that they be restrained from cutting down any more timber on the land, and from removing that already cut.

The defendants severed in their answers. Choppin admitted he was owner and in possession of a portion of the premises, under a title derived from Catherine Herbert, and late wife of François Bidou, who inherited from her brother Joseph Herbert, and that he bought it from Pierre Perrault,

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to whom it had been granted by the French government in 1767 ; and that these parties and those under whom they claim have had the uninterrupted possession in good faith ever since the original grant.

The defendants, Collinsworth and Joy, pleaded a general denial ; they denied the plaintiff's right and title and specially averred that they and those under whom they claim, had been long in the uninterrupted possession of the land claimed by them as owners, under a good and legal title. They adopt the answer of their co-defendant, Choppin, and plead the prescription of ten, twenty and thirty years.

These pleadings formed the principal issues in the case.

Both parties claim title under authority of the colonial governments of Louisiana. The plaintiff sets up title under the three Conways, granted by the Spanish government in 1786, as purchaser from their heirs and descendants, by public act dated the 11th November, 1835.

The defendants derive title from an order of the commandant of Point Coupée, made on the *requête* of Perrault, the 9th February, 1767 ; the commandant then being a French officer, acting under the orders of the French government. Perrault was put in possession ; and after making some improvements on the land, he, on the 19th April, 1774, sold and conveyed all his right and title to François Herbert. Herbert died insane, and his sister, Madame Bidou, became the owner. Bidou sold, to one Mathurin, the 14th May, 1807. This sale was afterwards set aside, and reverted to the widow, and was, ultimately, at the suit of her agent, Baudin, (at least thirty-two arpents front,) and bought by him at sheriff's sale. There were various other sales and transfers of the *locus in quo*, before it passed into the possession of the present defendants, which are fully set forth and explained in the opinion of this court, and need not be recapitulated.

The district judge, on hearing the case and the evidence adduced by the parties, pronounced judgment in the following brief manner :

"Both parties claim the land under Spanish titles, which were exhibited on the trial. The court is relieved from pronouncing upon the relative strength of these titles, by the plea of prescription set up by the defendants. In addition to their written title, they have established an uninterrupted possession in themselves and their authors, sufficient to justify a decree in their favor." Judgment was given for the defendants, and the plaintiff appealed.

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R. N. and A. N. Ogden, for the plaintiff, argued to show that the plaintiff had proved a good and complete title to the land in question, which could not be defeated by the defendant's title and adverse possession. The plaintiff's was complete and perfect, so as to entitle him to a recovery in the petitory action on the strength of his title.

2. The defendant's title was defective from its inception to the end of the chain under which the defendants claim. Their continuous possession has been interrupted, and so much broken as to prevent prescription. There is interruption during the possession of Mathurin and Baudin, from 1807 to 1814, which renders it impossible for the defendants to connect their possession, and that of their immediate authors, with the original title. This does away with the *long prescription*; and the titles are too imperfect to support the short prescription of ten and twenty years. On the strength of titles, the plaintiff must recover.

L. Janin, for the defendants, Choppin and others, argued to show that they had shown a connected and complete chain of title from the year 1767 down to the present defendants, which, coupled with a continuous adverse possession, would support all the prescriptions pleaded. The defendants have shown a good title, with continued and constant possession for more than half a century, and cannot be disturbed in their property and possession.

Elam, for Joy and Collingsworth, insisted that the plea of prescription must prevail. It was fully established by the

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evidence, and there is no adverse possession shown to interrupt it. It requires one year's adverse possession to interrupt prescription. *Old Civil Code, page 484, article 51; Louisiana Code, 2483, 3405, 3406, 3407.*

2. The plaintiff, having dismissed so much of his demand as embraces the claim of Patrick Conway, failed to show that Joy and Collingsworth were included in the survey of either of the other two Conways. The *locus in quo* is not proved separate from the part abandoned; so that the plaintiff cannot recover as to these defendants.

Roselius, for the plaintiff, insisted in argument that a good and complete title having been made out, the plaintiff must recover upon the strength of his title; that the facts and broken title of the defendants, even coupled with their possession, is not sufficient to enable them to hold out against the plaintiff's good and perfect title.

Simon J., delivered the opinion of the court.

This is a petitory action. Plaintiff alleges that he is the owner of a tract of land situated in the parish of West Baton Rouge, on the west bank of the Mississippi, containing forty arpents in front, more or less, by the depth of forty arpents, bounded above by *Fausse-Rivière*, which he purchased from the heirs of William Conway; that the titles to said land were originally granted in three portions, by the Spanish government, to William Conway, Patrick Conway, and Maurice Conway; that afterwards, William Conway acquired the title of his two uncles to their respective portions, died the sole and exclusive owner of the three tracts, and transmitted the same to his heirs, who sold to the petitioner. He prays that the defendants, who are in possession of the whole land, be condemned to deliver up the same to him, and to pay him fifteen thousand dollars for the rents and profits, and ten thousand dollars damages.

The defendants, after pleading the general issue and denying specially the heirship of plaintiff's vendors, aver that they are in possession of certain portions of the tract of land claim-

ed by plaintiff, which they purchased from the succession of Alexander Baudin, in April, 1836, as designated on, and according to a sketch annexed to the probate sale of the lands of the said succession; that the purchasers of the tract sold by the estate of Baudin, derive their title, by regular intermediate conveyances, from Catherine Herbert, widow Bidjou, who had inherited the same from her brother, Joseph Herbert, who had acquired it from Pierre Perrault, to whom it had been granted by the proper authorities. The defendants further allege a peaceable and uninterrupted possession, in good faith, and with a just title, since 1767, and plead the prescriptions of ten, twenty and thirty years.

Before the trial in the court below, plaintiff dismissed that part of his claim under Patrick Conway, and limited his demand to thirty arpents in front, by forty in depth, under William and Maurice Conway.

The record shows that plaintiff's titles to the thirty arpents, are predicated on a complete grant made by the Spanish government to William Conway, on the 1st February, 1786, for ten arpents in front, by forty in depth, situated in the district of Pointe Coupée, bounded on one side by Patrick Conway, and on the other by Maurice Conway; and on an order of survey issued on the 27th January, 1789, in favor of Maurice Conway, for twenty arpents in front, by forty in depth, situated in the district of Pointe Coupée, in the inferior part of the mouth of False River, and bounded on one side by the mouth of said False River, and on the other by the tract of William Conway. Both titles were regularly confirmed by an act of congress of the 28th of February, 1823, and are accompanied by plats of survey made under the Spanish government, showing their location. It further appears that Maurice Conway, by last testament, dated 22d of May, 1792, instituted his nephew, Wilson Conway, as his only and universal heir; and that the children of William Conway, after the death of their ancestor, sold the two tracts to plaintiff, on the 11th of November, 1835. The plaintiff relying wholly on his titles, has produced no proof of possession in himself, nor in any one of those under whom he claims.

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On the part of defendants, it has been shown that on the 9th of February, 1767, Pierre Perrault petitioned the French government of Pointe Coupée, for a tract of land on the point of False River, to contain forty arpents in front, by such depth as might be found; which was granted "*sous le bon plaisir de Monsieur le gouverneur*," with certain conditions and restrictions. This title, after having been once rejected by the United States land commissioners, when claimed in the name of Philip Bidou, was afterwards regularly confirmed in the name of Alexander Baudin, for forty arpents in front, by forty in depth, by act of congress of the 28th of February, 1823.

From the mass of evidence contained in the record, we have deemed it necessary, in order to understand the chain of titles under which the defendants pretend to possess, and particularly for the investigation of the question of prescription, to recapitulate the following facts: Perrault, in 1774, sold his land to Joseph Herbert; and so far, there is no proof of actual possession by Perrault, except that it appears from the sale, that he had cut down and hewed timber on the land. Herbert, who was in the lumber trade, cultivated the land, made pickets, and cut cypress timber on it. He became insane in 1776, a curator was appointed to him, and he died some considerable time afterwards. During his insanity, the land was left unoccupied; and for aught we know, it must have been during this period that the Conways made their application to the Spanish government. Herbert left no other heir but his sister Catherine, who was the wife of François Bidou, and resided in France. No further act of actual possession is shown until 1807; that a son of Mrs. Bidou came to Louisiana, and sold the land to Mathurin, under the pretence of having inherited the same from his uncle Herbert. Mathurin took possession of the land, and possessed it for several years; but already in 1806, Madame Bidou had sent her power of attorney to Baudin, who, in 1812, instituted a petitory action against him in the United States Court, based on the same titles relied on in this suit by defendants. Mathurin was evicted, and Baudin, in 1813,

was put in possession of the tract, as agent of Mrs. Bidou. In March, 1814, Baudin, as agent, sold a part of the land to Guinault; and in July following, Baudin became the purchaser of the balance at sheriff's sale; he took up his residence on the land with his family in 1815, and was there in 1816. In 1820, Guinault sold his part of the tract to Baudin, who, in 1821, had the whole of it surveyed by one L'Hermite; this witness found several persons living on it, with Baudin's permission. In 1822, one Brugé lived on the land; he had purchased a portion of it from Baudin, who, after his death, bought it back at probate sale. In 1833, Baudin sold the whole tract to Brunet, who took immediate possession, cultivated the land, made four crops, and remained there until the latter part of 1827, when, having failed, the tract was sold by his syndic, and bought in again by Baudin. After the death of Baudin, in 1834, the land was sold in five portions to several persons, who, together with their vendees, are the defendants in this suit.

The evidence shows, also, that in 1819, Baudin instituted a suit against Dubourg and Baron, agents of Mrs. Bidou, on an account of expenses incurred during his agency, in which he gives credit for the amount of the sales made by him to Guinault, and by the sheriff to himself, claiming judgment for the balance. He recovered; and an appeal having been taken to this court, the judgment was affirmed, and the matters of controversy resulting from Baudin's agency, were thereby ended. It is further in evidence that Baudin, styling himself the attorney in fact of the heirs of Patrick Conway, made application to the land office for the confirmation of their title; and although the identity of the individual has been very much controverted, we are satisfied that he is the same Alexander Baudin who obtained the confirmation of the title of Perrault. Proof has also been adduced, to show that Baudin paid the taxes on the land in dispute, from 1814 to 1834.

The record contains several bills of exceptions, one of which it is only necessary to notice: plaintiff objected to the production of a copy of the act of sale from Perrault to Her-

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An act of sale passed before the commandant of Point Coupée, in 1774, in presence of two witnesses, wherein it is stated that the vendor did not sign it, because he did not know how to write; but it is mentioned that the title was delivered to the vendee, who took immediate possession of the land, possesses the requisites of an authentic act, under the Spanish law.

Parole sales of immoveables have been repeatedly recognised under the Spanish law; and at that remote period, the ordinary mark of a party to an authentic act was not required.

Parole evidence is good to prove facts and circumstances of possession at a time when plaintiff's title was unknown, and when the parties could not be suspected of making evidence for themselves.

The acts and authority of a commandant, putting a settler in possession of a part of the

bert, on the grounds that the original had not been signed by the vendor, that it is not an authentic act, and that, therefore, the original must be produced and the signatures proven. The act was passed in 1774, before the commandant of Pointe Coupée, in the presence of two witnesses, and states that the vendor did not sign it, because he did not know how to write; the title is mentioned to have been delivered to the vendee, who, it appears, took immediate possession of the land. We think this act would have been sufficient evidence of title under the Spanish law, which, as this court has repeatedly recognized, permitted parole sales of immoveables; it has all the requisites of an authentic act; as such it remained deposited among the notarial records of Pointe Coupée, and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it; at that remote period, the ordinary mark of a party to an authentic act was not required. In our opinion, the district judge did not err in permitting the copy to be read in evidence.

The other bills of exceptions taken by plaintiff, appear to us to be unfounded: the documentary and parole evidence objected to, was certainly good for the purposes for which it was offered, and particularly to prove facts and circumstances of possession which took place at a time when the plaintiff's title was unknown, and when the parties could not be suspected to make evidence for themselves. The objection made to the introduction of Perrault's original title, goes to its effect and not to its admissibility.

After a careful examination of the facts of the case, and an attentive consideration of the rights of the parties, we have come to the conclusion that it has become unnecessary for us to inquire deeply into the validity of their respective titles. We are not disposed to question the authority of the French commandant of Pointe Coupée to put a settler in the possession of a part of the public domain by a written permission or grant which, showing the extent of the tract conceded, and accompanied with proof of long occupancy, might afterwards be considered by his government as a suffi-

cient title ; indeed, such a title has very often been recognized subsequently by the Spanish authorities, to be an absolute abandonment of the king's domain, and in a great many instances has been made the foundation, as in the present case, of favorable reports on which the government of the United States has confirmed a great number of private land claims. The jurisprudence of the Supreme Court of the United States on this subject, establishes the principle, "that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power, and that he who controverts a grant executed by the lawful authority, takes on himself the burden of showing, that the officer has transcended the powers conferred upon him." 12 *Peters' Reports*, 437 ; 8 *idem.*, 452-3-5, 664 ; 9 *idem.*, 134, 734 ; 6 *idem.*, 727 ; 10 *idem.*, 331. The rule applies also to the judicial proceedings of local officers, to pass the title of land according to the course and practice of the Spanish law in the province of West Florida. 8 *idem.*, 310. "When the act done is contrary to the written order of the king, it shall be presumed that the power has not been exceeded, and that the act was done according to some order known to the king and his officers." 7 *idem.*, 96 ; 8 *idem.*, 447, 451. "And courts of justice ought to require very full proof that he had transcended his powers, before they so determine it." 9 *idem.*, 464, 734. We conclude, therefore, that the authority of the French commandant, cannot properly be inquired into in this case. In relation to the question raised by plaintiff, whether the French authorities had the right to grant lands in Louisiana in 1767, it will be conceded that it comes rather late and with bad grace from a party who suffered his titles to lay dormant for upwards of half a century ; and as we deem it entirely useless to make it a matter of serious investigation in this suit, let it be sufficient for us to remark, that it is historically known that the Spanish government never contested the validity of the grants made by the French officers before the Spaniards took possession of the colony ; that the conduct of Spain amounts to at least a tacit ratification ; and that the government of the

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public domain, by a written permission or grant, showing the extent of the tract conceded, and accompanied by proof of occupancy, will be considered *prima facie*, a good and sufficient title. The acts of an officer to whom a public duty has been assigned, are *prima facie*, taken to be within his power and authority.

It is historically known that the Spanish government never contested the validity of grants made by the French officers, before the Spaniards took possession of the colony of Louisiana in 1769.

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United States, by the 4th section of the act of 2nd March, 1805, has expressly declared that all French grants made while the French government had the *actual possession* of the territory of Louisiana, should be recognized and protected. 1 *Land Laws*, 519; 2 *White's New Recopilacion*, 569. In this case, both parties have obtained the confirmation of the United States by the same act of congress, they therefore stand upon an equality with regard to our government; but, although, if their rights were to be tested on the strength of their respective titles, the plaintiff might perhaps succeed; we think it is only necessary for us to examine if the defendants have not acquired such title by prescription as to be considered sufficient to destroy the plaintiff's pretensions.

Before considering this question on its real merits, under the evidence adduced by defendants in support of their plea, it will not be unimportant to dispose of two questions raised by plaintiff's counsel for the purpose of showing that the plea of prescription founded on the possession of several individuals, has been interrupted by certain circumstances brought out by the evidence, and that such possession, however long it may have been, cannot benefit the defendants. He contends:

1. That the possession of Mathurin, under the title to him transferred by Philip Bidou, is an interruption, and cannot enure to the benefit of the defendants.

2. That Baudin, who possessed the land by himself and by others, from 1814 to 1834, was in bad faith; that he knew he was not the owner of the property, as his title under Mrs. Bidou was fraudulent, illegal and void; and because he was not ignorant of the plaintiff's titles, one of which was confirmed on his own application. He, therefore, maintains that Baudin's possession cannot be of any use to the defendants.

The possession of an usurper, or person under a defective *mesne* conveyance, and who is evicted, will not interrupt prescription, as against the rightful proprietor, when they both claim under the same original title.

I. From the circumstances of the case, it is clear, that Mrs. Bidou and Mathurin both claimed under the title of Joseph Herbert, whose heir Philip Bidou had alleged himself to be, when he sold to Mathurin. The suit then turned on the validity of this *mesne* conveyance, and not of the original

title. The possession of both parties originated under the same title, and may certainly be considered as a notice to any adverse claimant. We cannot see any good reason to allow to such adverse claimant, who remained silent during the controversy, the benefit of an interruption which he never caused, and which would destroy the effect of the previous possession. Mathurin, being an usurper, was evicted, and the property returned to the first and previous possessor. Vazeille, in his *Traité des Prescriptions*, volume 1, page 189, number 176, says: "Le possesseur troublé dans sa jouissance a le choix du recours au possessoire ou au pétitoire. Quelle que soit la voie qu'il prenne, le résultat est le même pour lui, si son action intervient dans l'année du trouble. Il est même très juste que, sans considération d'un tems aussi court, toute décision qui proscriit définitivement l'usurpation, fasse disparaître l'interruption qu'elle avoit produite. La cause cessant, l'effet doit cesser aussi. La raison l'indique, et Domat, l'enseigne dans ses lois civiles. (*Notes*, article 6, section 3, livre 3.) C'étoit aussi une règle établie, en termes généraux, par la loi, 13, section 9, ff. de acq. et amitt. poss. Si jussu judicii, res mihi restituta sit, accessionem esse mihi dandam placuit. Ce n'est plus la réintégration par la voie de l'interdit ou de l'action possessoire. Bruneman l'a bien compris; car, pour expliquer la loi, il présente l'exemple d'une éviction ordonnée contre l'individu qui détenoit la chose depuis six ans, et il dit que le possesseur réintégré peut joindre la possession de celui qu'il a évincé, à la sienne propre, pour former la prescription, et l'opposer à la tierce personne qui viendrait revendiquer cette chose. Suivant l'explication de Bruneman, Dunod affirme que 'l'on peut employer la possession de celui qu'on a fait condamner à la désistance.'

"Pothier, dans ses pandectes, livre 41, titre 3, numero 47, tire la même décision de la loi pré-citée. Il dit: Supposons que j'aie commencé de bonne foi la possession d'un fonds, qu'un usurpateur s'en soit emparé, et que je l'aie reprise en vertu d'un jugement, la possession de cet usurpateur comptera pour moi, tout comme si je n'avais pas été dépossédé. See, also, Troplong, *Prescription*, vol. 1, numbers 448 and 449,

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in which he quotes the opinion of Cujas, on the text of the law 13: *Prædone possidente, si jussu judicis res mihi restitua sit, accessionem mihi jussu dandam*, founded on the authority of the Baziliques: "*quod possidebas mala fide dedisti mihi, jussu judicis: accedit mihi tempus tuum*;" and number 451, in which the author says, "le système dont Cujas est l'organe me paroît sous tout point préférable, soit sous le rapport doctrinal, soit sous le rapport logique." We also adopt this system, and conclude on this point that Mathurin's possession, far from having caused an interruption, ought to be considered as a continuation of Mrs. Bidou's previous possession to enure to the benefit of her subsequent, *ayant cause*.

II. In order to prescribe, it is necessary that good faith should have existed at the commencement of the prescription. *Old Code, article 72, page 488; Louisiana Code, article 3448*. And it cannot be denied that Mrs. Bidou's possession, after the eviction of Mathurin, was one in good faith as well as before; and that, had she or her representatives transferred the property to the defendants, there would have been no doubt of the accomplishment of the prescription. But it is urged that Baudin, who began to possess for himself in 1814, was in bad faith; that he knew that the property belonged to others, and that, therefore, he did not possess *animo domini*. Had Baudin been the first possessor, or was the time to establish the prescription to be ascertained or computed by taking his possession as the commencement or origin of the right, the authorities quoted by plaintiff's counsel from Pothier and Troplong, would, perhaps, receive their proper application, and there would probably be no difficulty, under our law, to maintain him in his position. But here, Baudin was an intermediate possessor, and his predecessor was in good faith. *Troplong, Prescription, vol. 1, No. 432*, says: "Dès le moment qu'on succède à une personne, on doit pouvoir se servir de sa possession, toutes les fois que le vice qu'on peut lui reprocher n'empêche pas la prescription d'après les règles générales. Ainsi, dans l'exemple donné par Voët, je ne comprends pas pourquoi la mauvaise foi d'un possesseur intermédiaire empêcherait la jonction des possessions de bonne foi, qui ont précédé;

Where the original possessor was in good faith, although an intermediate possessor of the premises held in bad faith, the subsequent possessor in good faith can avail himself of the prescription applicable to such possession.

car il suffit que la bonne foi ait existé au commencement, et la mauvaise foi survenue plus tard ne vicie pas la possession. Qu'importe donc que l'un des possesseurs soit de mauvaise foi, si sa possession n'est pas celle qui ouvre le tems de la prescription." And in volume 2, numbers 937 and 938, the same author says: "Puisque le moment initial de l'acquisition est le seul point à considérer, il s'ensuit que lorsqu'un individu a possédé de bonne foi un héritage, et qu'il meurt avant l'accomplissement de la prescription, l'héritier qui lui succède continuera valablement à prescrire, quoiqu'il soit de mauvaise foi."

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De même, le successeur à titre particulier qui acquiert de mauvaise foi un immeuble, possédé avec titre et bonne foi par son vendeur, peut continuer la prescription commencée par ce dernier, et la conduire à fin, sans qu'on puisse lui objecter sa mauvaise foi. C'est à peu près comme si le vendeur lui-même fut devenu de mauvaise foi depuis son acquisition."

This distinction appears to us perfectly clear; Baudin himself would have been entitled to prescribe; and in our opinion, the defendants who hold under him, ought to have the benefit of his, as well as of all the previous possessions. This doctrine is, undoubtedly, a proper and correct interpretation of the article 3448, of the Louisiana Code, that says: "It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." Under this view of the question, it is immaterial whether Baudin's title under Mrs. Bidou, was fraudulent or not; and whether he knew, or not, that the Conways had a title which might afterwards prove to be better than his; and moreover, we are not ready to say that Baudin's title did not become perfect and final, by the judgment by him obtained in 1819, against the agents of Mrs. Bidou, and that the confirmation of the title in his name by the government of the United States, in 1823, ought not also to militate in favor of the defendants.

On the merits, we think the defendants have completely made out their title to the property in dispute, not only by the prescription of ten years, but perhaps also by that of

If the possession has commenced in good faith, and if it is afterwards held in bad faith, that will not prevent prescription, even if the possessor's title was fraudulent, and he knew another person had a better title.

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To support the long prescription of thirty years, possession only, without title or good faith is necessary: but continuous and uninterrupted possession, under a legal title, derived from the original grantee, with certainty in the object, and good faith in the first and subsequent possessors, will support the prescription of ten years.

Where the possession has not always been a corporeal one, but when it is necessary to complete a possession already begun, the civil possession will suffice.

thirty years. The facts which we have recapitulated, show clearly that the possession of those under whom defendants have acquired, began in 1774, and no title or good faith was necessary in support of this kind of prescription. *Louisiana Code, article 3465*; (and the same rule prevailed under the former laws of Louisiana.) In support of the prescription of ten years, which, if it were necessary, the defendants have even acquired under the Louisiana Code, they have shown: 1st. Good faith in the first and subsequent possessors, at least up to 1814: 2d. A legal title under the original grantee, sufficient to transfer the property: 3d. A continuous and uninterrupted, peaceable, public and unequivocal possession during the time required by law; and, 4th. A certainty in the object sold by Perrault to Herbert; being not merely his inchoate title, not even alluded to in the sale, but a tract of land of forty arpents in front, by the ordinary depth, sold with full warranty. *Louisiana Code, articles 3445, 3449, 3450, 3451, and 3452*. It is true that the possession has not always been a corporeal one; but when it is necessary to complete a possession already begun, the civil possession suffices, provided it has been preceded by the corporeal or actual possession of the thing. *Idem., article 3453*. We are, therefore, of opinion that the district judge decided correctly in rejecting the plaintiff's claim, and in maintaining the defendants in their title and possession of the property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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The possession of a usurper enures to the benefit of the real owner; and his bad faith cannot in any manner destroy or impair the right of the possession previously held in good faith.

But where the possession may have been obtained in bad faith, or the possessor may have been guilty of fraud, when he acquired his title, yet third persons not claiming under the same original title, or the party in whom it vested, cannot inquire into its defects or relative nullities.

This can be done only by those who have suffered from his acts.

No relative nullities in titles or deeds, accompanied with possession, even those resulting from fraud, can be inquired into collaterally.

R. N. and A. N. Ogden, prayed for a rehearing in this case, on the part of the plaintiff.

1. The court intimates very distinctly, that if this case were to be decided on the relative strength of the titles, the plaintiff would succeed; but it is decided against him, on the plea of prescription, "*the prescription of ten, and perhaps that of thirty years.*" The points investigated by the court, in connection with the plea of prescription, were these two: 1st. The possession of Mathurin and others, from 1807 to 1814, caused an interruption. 2d. Baudin was a possessor in bad faith, and, therefore, not entitled to the prescription of ten years.

But there was another point urged by the plaintiff, and on which he strongly relied, to wit: that the defendants had failed to connect themselves with the title of Madame Bidou, or, in other words, that there was no proof that Baudin ever acquired the title of Madame Bidou, or succeeded to her rights. We understand it to be admitted that Baudin was in bad faith, and that no prescription could be invoked by him or by his *ayant cause*, except the prescription of thirty years, unless by uniting his possession with the previous possession of Madame Bidou. It is evident, then, that the success of the defendants must depend upon their proving a

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connection between themselves and Madame Bidou. How is this shown. It must be recollected that the defendants hold the affirmative of that issue, and the burden of the proof lies on them, and they have not shown it.

[The counsel for the plaintiff then go into a minute detail of the facts of the purchases and acts of Baudin, and of Madame Bidou's title. They finally conclude a laborious investigation of this subject, by saying that the court fell into an error, caused by an erroneous view of the facts of the case, and that it will be at once conceded, that no ratification of Baudin's title and proceedings ever took place, and that he never acquired the rights of Madame Bidou; and that the defendants can derive no aid either from her title or her possession.]

2. The defendants then must commence their prescription with the possession of Baudin. But in the decision, the court appears to consider it necessary to their success, to be able to connect themselves with the possession of Madame Bidou, as it clearly is. Considering that connection as established, the court decides it sufficient that the possession commenced in good faith. But, under the view of the facts which we have presented, these circumstances become very material, and, therefore, we hope in the language of the decision, to be "maintained in our position;" that the bad faith of Baudin prevents his vendees from prescribing in less than thirty years. His bad faith is too apparent to require comment. The court appears to be convinced of it. If these views are correct, then the plaintiff is entitled to recover in this suit, and it will become entirely unnecessary to examine further into the titles of Madame Bidou. In the case of *Bedford vs. Urquhart et al.*, 8 *Louisiana Reports*, 246, this court says, "it cannot be necessary in every petitory action, that the plaintiff should show title in himself good against the whole world, and perfect, in order to recover against a naked possessor. He is bound to produce a title as owner, *causa idonea ad transferendum dominium*, to repel the presumption of

ownership resulting from mere possession, and the date of his title ought to be anterior to the possession of the defendant." The confirmation by the United States to Baudin ensured to the benefit of the owner. It was only a relinquishment of the claims of the government, and Baudin remained after it, as he was before, a mere naked possessor. The defendants only have his rights.

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We feel confident that the court will not refuse a rehearing on any views they may possibly entertain of the equity of the case, because that branch of the subject has not been investigated, in the arguments nor in the decision; and if the decision is to turn on that question, the plaintiff ought to be heard. We confidently affirm that the equity of the case is with the plaintiff. The evidence shows that the land has been abandoned for many years, and the plaintiff bought it for what was considered then a fair price for such land. The levee which has reclaimed it, *was made at the public expense*. The defendants bought it for a less price some time afterwards. The notoriety of the Conway titles prevented Baudin, as is shown on one occasion, from making a bargain with a neighbor respecting this land. The defendants must have known they were buying a law-suit; if they did not, this suit has afforded the means of withholding the price or obtaining security. Justice certainly requires a re-examination of the case.

Roselius, on same side, contended, that the sale of the property, by the son of Mrs. Bidou, to Mathurin, and the possession of the latter for six years was an interruption of prescription. He possessed under a title translatif of property, and acquired it from the person he believed to be the owner, and his possession must be an interruption of the possession of Herbert's heir. It can hardly be doubted but he *could have acquired* the land by prescription under his title.

2. We mainly rely on obtaining a rehearing, on the ground that the court erred in considering that the defendants hold under Herbert, through Madame Bidou. We

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contend there is no proof whatever that her title was ever acquired by Baudin; and surely the appellees cannot be sustained in their plea of prescription, unless they establish affirmatively that her title and possession has been transferred to them. Baudin, as the pretended agent of Madame Bidou, attempted to sell a part of the land in 1814, to Guinault, who in 1820, retroceded it to him, (Baudin.) There is no power of attorney shown, or authority to make this sale. It was in fact a simulation and a sale to Baudin himself, and null. Madame Bidou was not divested of title to that portion of the land sold at sheriff's sale, and bought by Baudin. It was evidently an illegal proceeding from beginning to end. Besides, an agent can no more obtain a legal title by the purchase of the property of his constituent, than by a sale to himself. The difference is only in form. The only reliance on the validity of the sales to Baudin, is, that they were subsequently ratified by a proceeding instituted by him against Dubourg & Baron, the proper agents, and representing Madame Bidou's interest and rights. This could not be done, for there were minors, and their interests could not be alienated.

3. It is also said, that the objections against Baudin's title are only relative nullities, of which none but the heirs of Madame Bidou can avail themselves. This might perhaps be true, if it appeared that her title was better than the plaintiff's; but then there would be no necessity for the plea of prescription. As the defendants attempt to destroy our adverse possession, we are clearly entitled to show that they have not had their adverse possession. They have no right to invoke any possession but their own, since the sale of Baudin's succession, and no one will insist that the possession of Herbert, or Madame Bidou or her heirs, can enure to the benefit of the defendants, unless they can show that they have succeeded to their titles.

Simon, J., delivered the opinion of the court.

Plaintiff's counsel, in their application for a rehearing, have called our attention to two errors of fact which they

ascribe to the confusion of the record, and which they consider very material: 1. That Dubourg & Baron were not the agents of Mrs. Bidou, but were the agents of the tutor of her minor heirs. 2. That Baudin did not recover a judgment for the balance by him claimed, after deducting the credit for the amount of the sales of the land made by him to Guinault, and by the sheriff to himself; but only recovered the amount for which he had, in the opinion of the referees, proven his account; and the counsel earnestly expresses the hope that the correction of these inaccuracies will have the effect of changing the ultimate result of this cause. He further maintains, that Baudin's title is stained with such nullities that he cannot be said to have ever acquired the rights of Mrs. Bidou, and that the defendants, unable to connect themselves with her possession, can derive no aid either from her title or her said possession.

A renewed and attentive perusal of the immense record from which we derived the statement of facts contained in our previous opinion, has shown us that we were laboring under a mistake when we called Dubourg & Baron the agents of Mrs. Bidou. She had been dead since 1815, and the suit instituted by Baudin, in 1819, was brought against them as the agents of the tutor of the deceased's minor heirs. We think, however, that this circumstance cannot benefit the plaintiff, nor can it in any manner change or modify the situation of the rights of the parties to this suit, as the sale from Baudin to Guinault took place in March, 1814, and the sale from the sheriff to Baudin was made in July following, about a year previous to the death of Mrs. Bidou.

With regard to the other alleged inaccuracy, it is proper that we should inform the counsel that we were aware that Baudin had not recovered the entire balance by him claimed, after deducting the credit, allowed in his account, for the amount of the sales of the land. We merely intimated, in our decision, that he had recovered judgment in a suit in which he had attempted to account for the price of the land by him received as agent, and had given credit for said price

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in his account of expenses. It may, perhaps, not be immaterial to remark here, that the principal issues or averments contained in the answer of the agents of the tutor of the minor heirs, was, "that Baudin had promised, and *was bound*, to deliver back to them, in their *aforesaid capacity*, the land lying in the parish of *Pointe Coupée*, together with the rents and profits which he may have received, &c.; and that, in their said capacity, they were not bound to pay Baudin any sum of money whatsoever for his pretended expenses, until he returned them the land in question, *unless he gave a faithful and legal account thereof*." On these issues, the case was decided. Baudin was not ordered to deliver back the *Pointe Coupée* land, as claimed by the defendants in their answer, but, on the contrary, recovered a judgment for two thousand and twenty-three dollars and thirty-seven and a half cents, found by the referees to have been the amount of expenses by him incurred for the benefit of Mrs. Bidou during his agency; and, as all matters relative to said agency were in controversy in said suit, we are unable to say that we came to a wrong conclusion in declaring, so far as the same can be inquired into collaterally in the present suit, that all those matters were ended by the said judgment.

It is, however, insisted that Baudin's title has no legal validity; that the minor heirs of Mrs. Bidou are not bound by the sales from which the property was transferred to Baudin, the unfaithful agent of their ancestor; that the judgment, above alluded to, is not binding on said minors; and that, therefore, Baudin, having no title, could not transfer any to the defendants, who, consequently, are unable to connect themselves with the possession of Mrs. Bidou. In other words, it is seriously contended by plaintiff's counsel, that because Mrs. Bidou, or her heirs, may perhaps show that they have never been legally divested of their title to the land in controversy, particularly on the grounds of want of authority, and of *bad faith and fraud* on the part of Baudin, their clients should be allowed to recover the land to the prejudice of both the defendants and the heirs of Mrs. Bidou.

This appears to us to be a *non sequitur*, and we cannot for a moment entertain any such idea. Suppose the real right of ownership to be yet vested in the heirs of Mrs. Bidou, whose title has apparently been transferred to Baudin; would this circumstance entitle the plaintiff to recover it? Would it add any thing to the strength of his title? Or, would it destroy, in his favor, the effect of the possession of Baudin and of the defendants? Certainly not, as we have already decided. They would be considered as usurpers, (as we considered Mathurin,) and, as such, their possession would enure to the benefit of the real owner; and, if so, the situation of the plaintiff would not be bettered. This is, however, the main ground upon which the rehearing has been applied for, and it is indeed a singular position. It must have required all the ingenuity of zealous and learned counsel, to give it the appearance of plausibility; but the counsel has certainly misconceived the bearing of our decision, and the extent which we gave to it, or has made an incorrect application of the principles upon which it is based. The only question which the court considered themselves called upon to examine was, whether Baudin had a title translatif of property upon its face, and was in possession under said title. If he had, the next inquiries were, whether there was good or bad faith in his possession, and whether his said possession was intermediate or original. His title was legally transferred to the defendants, who became entitled to the benefit not only of Baudin's possession, whose bad faith could not in any manner destroy or impair the effect of the possession previously held in good faith, *Louisiana Code, article 3448*; but also of Mrs. Bidou's, under whom he apparently held. Baudin's possession may have been stained with bad faith from its origin; he may have been guilty of fraud when he acquired his title, but the plaintiff has certainly no right to inquire into such defects or nullities as are only relative to, and can only be taken advantage of by those who may have suffered from his acts. 2 *Louisiana Reports*, 70. There is no principle better established in our jurisprudence than this: that "no relative nullities in titles or deeds, accompanied

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The possession of an usurper enures to the benefit of the owner; and his bad faith cannot, in any manner, destroy or impair the right of the possession previously held in good faith.

But, where the possession may have been obtained in bad faith from, or the possessor may have been guilty of fraud when he acquired his title, yet third persons not claiming under the same original title, or the party in whom it vested, cannot inquire into its defects or relative nullities. This can be done only by those who have suffered from his acts.

No relative nullities in titles or deeds, accompanied with possession, even those resulting from fraud, can be inquired into collaterally.

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with possession, even those resulting from fraud, can be inquired into collaterally," 13 *Louisiana Reports*, 395; and we doubt that it could be done, even if the plaintiff held his title under the same person. We have already intimated, and even said in our first opinion, that Baudin's title was translativ of property on its face; he was the agent of Mrs. Bidou, sold as such to Guinault, in March, 1814, acquired the balance of the land from the sheriff in July following, took up his residence on the land with his family in 1815, purchased the tract of Guinault in 1820, and obtained the confirmation of his title in his own name by act of congress of the 28th of February, 1823; the acts of sale are all regular, and in due form; and in our opinion, the circumstance that his vendors may have to set up, against the validity of Baudin's title, certain nullities resulting from his fraudulent acts, which nullities are merely relative, cannot prevent it from having, as it now stands, its full and legal effect as a just title; *Louisiana Code*, articles 3449, 3450, 3451, and 3452; and we do not think that the defendants, who have not been shown to have had any knowledge of the fraud attributed to Baudin, be prejudiced by it, at least so far as to avail the plaintiff.

The rehearing is, therefore, refused.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The purchaser of a specific, but undivided, portion of a square of ground, for a particular sum or price, and gives his obligations with mortgage to secure payment, this mortgage only extends to his portion or interest, and cannot be enforced, in the executory proceeding, for any of the obligations of his co-purchasers, although the sale and mortgage is all included in one and the same act.

It was the intention of the parties to acquire such distinct portions of the property conveyed as might have been made the subject of separate deeds of sale, and that, although undivided, the square of ground cannot be said to have been purchased in common; and the payment of the notes of any one purchaser, extinguishes the mortgage as to his part, and gives him an absolute and distinct title.

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Although a mortgage is indivisible, and prevails over each and every portion of the property, yet when the obligations given for a part, only, of the whole property, are paid, the mortgage being but the accessory is extinguished.

So, where co-purchasers of distinct and separate portions of undivided property, and jointly mortgage it to secure payment of the price, yet when any one pays for his portion, the mortgage is extinguished as to that part.

This suit commenced by injunction. The plaintiffs show that in July, 1837, they purchased one undivided eighth of a square or islet of ground in New-Orleans, paid part of the price in cash, and for the balance gave their notes, which they paid at maturity.

They further allege, that their co-purchasers of the remaining portions of said square, failed to meet their engagements, and that judgements have been rendered against them, and executions issued, which have been levied on the whole property, including their portion, which is advertised for sale. They pray for an injunction to stop said sale, and that Lizardi, Hermanos, and the sheriff, be perpetually enjoined from selling their eighth part, which they show is in no way liable to the mortgage of said Lizardi, Hermanos.

The defendants aver, that the injunction has been wrongfully sued out; that the whole property is mortgaged to secure as well the purchase price of the portion or interest of the plaintiffs as that of their co-purchasers; that such was the intention of the contracting parties at the time the act of sale was passed; and such is the true intent and meaning of the special clause to that effect in the deeds passed concerning the sale to the plaintiffs and their co-purchasers.

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Upon these pleadings and issues the cause was tried.

The facts of the case show that this square, or islet of ground, belonged to Lizardi, Hermanos, and that, by agreement with certain persons, it was sold out by shares or distinct portions, to several purchasers, the interest of each being particularly specified and designated, but the property, or square, remained in a state of indivision. Each party purchased his distinct interest for a specific price, which was liquidated by part cash payments and notes given. The act of sale included all the purchasers, but specified each one's separate share or portion, both of the property and the price, and mortgage was retained and acknowledged by each set of purchasers on his portion or share, to secure payment. The plaintiffs had paid off the amount of their purchase, but some of their co-purchasers failed, and the Lizardis (original proprietors,) were proceeding against the whole property for this default; when both they and the sheriff were stopped by the plaintiff's injunction.

There was judgment perpetuating the injunction, and the defendants appealed.

L. Peirce, for the plaintiffs and appellees.

1. The only question in this case is, whether it was the *intention* of the purchasers, that their several portions were to be mortgaged for the debts of each other. This is certainly not to be presumed, and must be fully shown, not by severed expressions, but by reading the whole agreement, and construing such expressions by the context.

2. It seems from the first act, that Lizardi, Brothers were in possession of a square of ground, containing fourteen lots, which three persons were desirous of purchasing on a speculation; their intention was, to make a new division of the square and plan, and sell it out into lots on credit. In consequence, they transacted with Lizardi, Brothers, as follows: They paid to the latter ten thousand dollars, and took their obligation that they (the Lizardis) should make the titles themselves, in favor of the persons who should hereafter

become purchasers, and should retain from the proceeds of the sale which shall be made of the said square of ground in different lots, the notes accruing from the said sale, to the amount of fifty thousand dollars, giving to the Lizardis the choice of notes, and binding themselves to cause the said notes to be endorsed to their satisfaction; the payment of which notes was to be secured by special mortgage on each of the lots, for which the same shall be given in payment. But if in case Baldwin, Cash and Alling, should wish to hold the property in their own name, and not divide it into lots, then Lizardis were to sell directly to them; they giving their notes endorsed to the satisfaction of Forstall, the agent of Lizardis.

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3. Now, so far as this agreement conveys their intention, it evidently was not in contemplation of the parties, that a mortgage on the *whole* square was to be made for each share; for Forstall agrees to divide that which his counsel now thinks indivisible. The mortgage, in case of sale in lots; and if in case of the sale of the square without lots, he stipulates for *their notes endorsed to his satisfaction*, without a word about the mortgage.

4. Let us see what he means by their notes endorsed to his satisfaction; for if we find him in the execution of this agreement, selling the square to them, and requiring that each note should be signed by *all three*, and endorsed by some *fourth* person, we will believe that he required a mortgage on the whole square for each and every portion. But, far otherwise, for in the agreement he takes from each one his name alone, with *endorser*: so that again he shows that he never considered that they were intended to be bound jointly and severally.

5. The obligation contracted by the purchasers is a joint obligation, but not *joint* and *several*. Solidarity is never presumed; and here there is no leaning to it. They mortgage the property conveyed to them, as it has been conveyed to them, which has been to each for *his proportion of interest*; they never dreamed that their proportion of interest was to be the pledge of another man's debt.

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Grima, for the defendants and appellants :

1. The defendants contend that there is error in the judgment of the Parish Court, ordering the injunction obtained by the plaintiff in the above entitled suit, to be made perpetual, on the ground that from the whole contents of the act produced, the intention of the parties never was that the whole of the property should be mortgaged to secure the payment of the notes given in payment of each individual share. The plaintiffs in injunction did, by becoming purchasers by the deed of sale, passed on the 22d July, 1837, put themselves in the lieu and place of William Alling, one of the original purchasers, by virtue of the agreement between them and the defendants, and did assume the responsibilities to which the said William Alling was subject. By that agreement, the mortgage was to be divided only in case the property should be divided and sold into lots, in conformity with, and within the delay determined in the said agreement. But the division and sale into lots did not take place, and the whole property was sold to Joshua Baldwin, Thomas C. Cash, George Olden and Walton & Kemp, each in the proportion of interest stipulated in the deed of sale of the 22d July, 1837.

2. By our laws, *Louisiana Code*, article 3249, the mortgage, which is a legal right on the property is in its nature indivisible and prevails over all the property subjected to it, and over each and every portion thereof. The mortgage cannot, therefore, be divided in a deed of sale, wherein the vendor generally reserves his right of mortgage against the property conveyed, unless such division be expressly stipulated in the conveyance. In the deed of sale of the 22d July, 1837, no stipulation to that effect can be found, nor can it be inferred from the clause reserving the mortgage. The purchasers declare that, "in order to secure the payment of the notes subscribed by them, by virtue of said act and amounting together to the total sum of fifty thousand dollars, they jointly affect, mortgage and specially hypothecate the property conveyed, &c. Can this mean that each of the purchasers does separately mortgage his undivided portion. If such had been the intention of the parties, the specific portion of each purchaser

should have been described, and specially and separately mortgaged. The contrary intention of the parties results from the same clause, whereby the purchasers, each in proportion of their respective share and interest in said property, confess judgment in favor of the vendors, in the sum of fifty thousand dollars, and whereby the vendors *expressly reserve to themselves the right and privilege, in case of non-payment of any of the aforesaid promissory notes, at the respective periods of maturity thereof, to cause the said described premises, to be seized and sold by executory process.*

3. The reservation expressed in this clause appears to me to be conclusive of the intention of the parties, that the mortgage was not to be divided, and that in case of non-payment of any of the notes of the purchasers, the legal right of the mortgagees was reserved on the whole of the property. (*The said described premises,*) as described in the deed of conveyance, and bound for the discharge of all and each of the obligations furnished for the consideration.

Simon, J., delivered the opinion of the court.

The plaintiffs state, that on the 22d of July, 1837, they purchased of the defendant one undivided eighth part of a square or islet of ground, in the suburb Annunciation, designated as No. 66 on the plan made by Lafon, and comprising fourteen lots; that they paid their proportion of the cash amount stated in the act of sale; that for the balance they furnished four several promissory notes, to the order of a third person who endorsed them; and that the said notes having all been paid at maturity, they owe nothing on the price or consideration of their purchase. They further allege, that their co-purchasers of the other seven-eighths having failed to meet their engagements and pay their notes, judgments were rendered against them in favor of the defendants; and that, executions having issued, they have caused the whole square, including the plaintiff's portion, to be seized and advertised for sale, by virtue of the mortgage. They also allege, that it was not their intention to become bound for the debt of their co-purchasers; nor that the

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interest, by them acquired in the property, should remain mortgaged to secure the debts of other persons, with whom they had no connection; and that their undivided eighth of the square purchased is now free from all mortgage, and cannot be seized and sold. They made the sheriff a party to the suit, and obtained an injunction; which, after issue joined by defendants, in which they seek to maintain their right of mortgage to the whole square of ground, to secure the price thereof; according, as they state, to the true intent and meaning of the clauses and stipulations contained in the deed of sale, was made perpetual. From this judgment the defendants appealed.

The evidence shows, that in December, 1836, the defendants' agent entered into a written agreement, under private signature, with several individuals, to sell them the property in question for sixty thousand dollars, of which ten thousand dollars were to be paid in cash; to have it divided into lots, and to permit the same, so divided, to be exposed for sale, afterwards, in the name of the defendants, on condition that the choice of the notes accruing from the sales, and satisfactorily endorsed, should be given to the defendants in payment of the balance due them on the original price; and it was also agreed and understood, that "*the payment of the notes should also be secured by special mortgage on each of the lots for which the same should be given in payment;*" and, further, that if the then purchasers wished to hold the property in their own names, the sale should not be made in lots, but that the whole should be conveyed and transferred to them by a regular notarial act, to be hereafter executed, on their furnishing to the vendors their separate notes, satisfactorily endorsed, to the amount of the said balance, payable in four equal instalments.

On the 22d of July, 1837, the parties appeared before a notary and executed a regular deed of sale, based on the written agreement under private signature, and nothing was changed in its disposition except that the property, not being any more subject to be exposed for sale in the manner provided for, was absolutely conveyed, in distinct portions, to the

original purchasers; and that the plaintiffs and another person having been substituted to one of the first contracting parties, the said plaintiffs became the purchasers of one undivided eighth part of the square, paid their share of the cash, and, for their proportion of interest, furnished their separate notes, satisfactorily endorsed, and countersigned, *ne varietur*, by the notary.

In relation to the mortgage, we find in the act the following stipulations: "*And in order to secure the full and punctual payment of the above described promissory notes, they jointly, affect, mortgage and hypothecate, &c. &c.; which clause, being preceded by, 'and for the balance, to wit: \$50,000, &c. &c., said purchasers have produced and furnished in their respective proportions of interest in the purchase of said property, the following promissory notes, &c. &c.,' is followed by, 'and the said purchasers, each in the proportion of their respective shares and interest in the said property, do hereby confess judgment, in favor of the said vendors, for the aforesaid sum of \$50,000;' and, further, 'the said vendors, reserving to themselves the right and privilege, in case of non-payment of any of the aforesaid promissory notes, at the respective periods of maturity thereof, to cause the described premises to be seized and sold by the executory mode of proceeding,' &c. &c.; and it is also necessary to remark, that the proportion of the respective shares and interest of the purchasers, is previously established, thus: 'Now the said parties do hereby agree that the sale of the said square of ground shall be made in favor of,' &c. &c., 'in the following proportions,' &c.*"

From the particular care which the parties appear to have taken to distinguish their proportion of interest in the property sold, in payment of which they respectively gave their separate obligations, endorsed by different endorers, it seems to us that it was their clear intention to acquire such distinct portions of the property conveyed, as might have been made the subject of separate deeds of sale to each of them respectively; and that, although undivided, the square of ground cannot properly be said to have been purchased in common. Solidarity is never presumed; and here, far from there being any

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It was the intention of the parties to acquire such distinct portions of the property conveyed, as might have been made the subject of separate deeds of sale, and that, although undivided, the square of ground cannot be said to have been purchased in common; and the payment of the notes of any one purchaser extinguishes the mortgage as to his part, and gives him an absolute and distinct title.

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clause from which the least presumption of solidarity could arise, it is expressly understood that each of the parties is purchasing a distinct proportion of the square, unconnected with the others, though yet undivided, and for the payment of which proportion of interest, he becomes distinctly obligated. Under this view of the contract, it is perfectly clear that the intention of the parties was not to become bound for each other, nor as the security of each other; and that the payment of his notes by one of the purchasers, was to be a sufficient extinguishment of his obligation, and gave him an absolute title to the portion by him acquired free from the vendor's mortgage and privilege; and if so, we are unable to see any good reason why, on producing the notes duly receipted and certified according to law, to the recorder of mortgages, he could have refused, if an application had been made to him, to erase or enter a release of the mortgage reserved for the security of said notes.

Although a mortgage is indivisible, and prevails over each and every portion of the property, yet when the obligations given for a part, only, of the whole property, are paid, the mortgage being but the accessory, is extinguished.

So, where co-purchasers of distinct and separate portions of undivided property, and jointly mortgage it to secure payment of the price, yet when any one pays for his portion, the mortgage is extinguished as to that part.

But it is contended, that although under the contract, the obligations of the purchasers to pay the price may have been distinct and separate, still, the mortgage and privilege reserved to secure the payment of said price, prevails over each and every portion of the property conveyed and subjected to it; and that in order to limit the exercise of such mortgage, there ought to have been an express stipulation. It will be conceded, however, that the mortgage is only an accessory to the principal obligation, and that the extinguishment of such principal obligation, operates the release of the mortgage. *Louisiana Code, articles 3251, 3252.* If so, how can the defendants insist on preserving their right of mortgage on every portion of the property conveyed, after having been paid off the amount of the price of any one of those portions? The principal obligation in this case is in the nature of a joint one, and so is the mortgage, as it clearly results from the express clause, that "*the purchasers jointly affect, mortgage,*" &c.; and it is a well known rule, that "*several obligations,*" although created by one act, have no other effect than the same obligations would have had, if made by separate contracts. *Louisiana Code, article 2079.*

It is true, that the mortgage is in its nature indivisible and is a legal right on the property, bound for the discharge of the obligation. *Louisiana Code, article 3249.* But it is also true, that this legal right ceases and is necessarily destroyed, after the obligation has been satisfied; and that as in this case, if the parties had expressly mortgaged the whole square, they could not have divided it without the consent of the mortgagees; so, the purchasers could not have subdivided their respective portions without the consent of the defendants. The clause which provides for the seizure and sale of the described premises by executory process, cannot be understood in any other manner but in reference to the previous stipulations; and its only meaning is, that in case of non-payment of any of the promissory notes (given by each of the purchasers for his proportion of interest) the premises should be seized and sold in proportion to the parties' previously described and respective interest. On the whole, it is impossible for us to conclude that the plaintiffs ever intended that after satisfying their distinct and separate obligations, their undivided portion of the square should remain obligated and mortgaged to secure and pay the debts of their co-purchasers. To give this effect to the act, an express stipulation was undoubtedly necessary. We are of opinion that the parish judge did not err in making the injunction perpetual.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs.

HEERMAN'S HEIRS ET AL. vs. MUNICIPALITY NO. TWO.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The act of 1832, for opening streets in New-Orleans, requires that the commissioners of estimate and assessment should be competent to serve as jurors in the District Court, but a privilege of exemption from serving on the jury, does not render a person incompetent to serve as a commissioner.

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NO. TWO.

The assessment of commissioners, under the act of 1832, for opening and improving streets in New-Orleans, is their peculiar province; and like the finding of a jury or the report of experts, it should not be disturbed except for manifest error.

This suit, in its present shape, arose out of the proceedings instituted by Municipality No. Two, for the opening and laying out a new street, from Poydras to Girod streets, between Tchoupitoulas and Magazine streets, in the city of New-Orleans.

The heirs and children of Dr. Lewis Heerman, and others, being owners of property through which the new street runs, made opposition to the assessment and report of the commissioners of assessment :

1. That the assessment and report was not made by three commissioners, but by only two of the three persons named by the court. That James Rees, one of the commissioners duly appointed, was not dead, and had neither resigned or refused to act, but was in fact, when the commissioners were called upon to act, *absent from* the state. That John M. Bach, another of said commissioners, resides out of the parish, and is not a competent juror therein, and by law disqualified to act as a commissioner of assessment under the act of 1832, for opening and improving streets in New-Orleans.

2. That the commissioners have wholly disregarded an obvious rule of equity, in assessing the damages sustained by the proprietors of property in the immediate neighborhood, and have taken thirty-five feet of ground in width, for the new street, belonging to Dr. Heerman's heirs, and pretend that they are so much benefited, that they should pay to the Municipality, one thousand seven hundred and twelve dollars and fifty cents, when these proprietors are left with only nineteen feet front on one side and sixty-seven on the other of the new street. It is true, it gives them two corners on Girod-street, but one of them running only nineteen feet on the new street, is of little value.

These opponents allege, that there should be a new assessment, and that they are entitled to have their property estimated and assessed by *three commissioners*, &c. That the

present report should be rejected as informal, illegal and unjust towards these opponents.

The facts of the case show, that in July, 1838, Municipality No. Two, on the petition of several owners of the property in the neighborhood, instituted proceedings to open a new street from Poydras to Girod streets, and that the new street (thirty-five feet wide) terminated in Dr. Heerman's property situated on Girod-street, so as to leave two corners; one having sixty-seven feet front, and the opposite but nineteen feet front on the new street, after taking thirty-five feet in the whole width for the new street.

Messrs. S. Blossman, J. M. Bach and James Rees were appointed the commissioners of estimate and assessment, and assessed Dr. Heerman's property to pay one thousand seven hundred and twelve dollars and fifty cents, for its enhanced value in giving it two corners on Girod and the new street.

There had been a previous assessment and report, and the case had been referred back to the commissioners for another report.

When called on to make the second estimate, assessment and report, James Rees, one of the commissioners, was absent from the state. The other two went on, and returned their report into court. The evidence shows that Mr. Rees was absent, took no part in the assessment, and was not in the country at the time the assessment was made.

The opponents protested against the whole proceedings, both by the Municipality and the court, as informal and illegal, and notified this to the commissioners in writing.

The District Court pronounced the following judgment in the case.

"The oppositions are of two classes. One relating to the commissioners, and the other to the manner in which they have executed their duty.

"The oppositions of the first class are to this effect, that J. M. Bach, one of the commissioners, is not competent to serve as a juror in this court; and that the report is signed by only two of the commissioners.

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"J. M. Bach is a resident of the parish of Jefferson, beyond the bounds of this city. He could not, therefore, be compelled to serve as a juror in the District Court; but *he is competent to serve* as a juror, inasmuch as he is a citizen, a housekeeper, and a tax payer. His residence gives him the privilege of exemption, but it is no objection to his competency.

"Mr. Rees, one of the commissioners, was absent from the state when the assessment and report was made. There is nothing in the statute of 1832, which prevents the other commissioners from reporting in his absence; but on the contrary, the ninth section expressly authorizes two commissioners to act in all cases.

"The second class of oppositions refers to alleged errors of the commissioners, in either allowing too little or charging too much to the several opponents.

"This is the second report of these commissioners. The first report was referred to them by the court, with instructions as to the legal principles that were to guide their assessment.

"The instructions thus given appear to me to have been regarded by the commissioners in making their second report. Their opinion has thus conformed to mine on principle. Upon details, I am inclined to submit my opinion to theirs, regarding the commissioners of estimate and assessment as a species of jury, and that matters of fact are peculiarly of their cognizance. The report must be confirmed."

The opponents appealed.

L. C. Duncan, for the opponents, urged upon the court the many irregularities in the proceedings, on the part of the Municipality. He insisted that, as a matter of right, the opponents should have had the benefit of three commissioners to estimate, assess, and pass upon their legal rights, and to estimate their losses and advantages in a proper manner. That the report of two commissioners, under the circumstances of this case, is illegal, Rees being actually *absent* from the state at the time he was called to act; it is, in fact,

allowing but *two*, instead of *three* commissioners, as required by law. See *Session Acts of 1832, sections 3 and 8, page 132.*

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2. Another of the commissioners, (Bach,) was incompetent. He lived in another parish, and was not a competent juror in the District Court, and consequently not competent to serve as a commissioner of estimate and assessment of property in the city of New-Orleans. See *Jury Laws of 1st District Court, and law of 1832 for opening and improving streets in New-Orleans.*

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3. The commissioners committed egregious errors in assessing the damages and estimates of the property to be taken. The heirs of Dr. Heerman are charged seven hundred and fifty dollars for two corners on the new street, and three thousand seven hundred and sixty-two dollars are placed as the value of their fronts. One corner has sixty-seven, and the other nineteen feet front, on the new street. Is it just, reasonable, or fair, to compel a party to pay as much for corners thus circumstanced? There is a difference of forty-eight feet on the two corners, and yet there is no difference in the estimate. After taking thirty-five feet wide of our property for the new street, we are brought in debt for upwards of seventeen hundred dollars, as a contribution over and above, for the supposed advantages to be derived. This is monstrous injustice.

Carter, attorney for the Municipality, prayed for the affirmation of the judgment.

Martin, J., delivered the opinion of the court.

The defendants are appellants from a decision overruling their oppositions to the report of commissioners appointed under the act of 1832, for opening streets, and the judgment given accordingly.

The oppositions were of two kinds. The first relates to John M. Bach, one of the commissioners, who is alleged to have been improperly appointed; and, also, to the report, being signed by two commissioners only.

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NO. TWO.

The act of 1832, for opening new streets in New-Orleans, requires that the commissioners of estimate and assessment should be competent to serve as jurors in the district, but a privilege of exemption from serving on the jury, does not render a person incompetent to serve as a commissioner.

The assessment of commissioners under the act of 1832, for opening and improving streets in New-Orleans, is their peculiar province; and like the finding of a jury, or the report of experts, it should not be disturbed except for manifest error.

The second ground of opposition consists of alleged errors of the commissioners in estimating and assessing the value of the property of the opponents taken and assessed for the proposed new street.

1. The third section of the act of 1832, requires that the commissioners appointed to assess and estimate the property, should be competent to serve as jurors in the District Court. It is objected, that John M. Bach, one of the commissioners, although he possesses all the qualifications of one of the jurors of said court, might have refused to serve, if summoned, on the ground that he resides in the parish of Jefferson, within the jurisdiction of the Court of the First District, and not in the parish of Orleans, where the sessions of the court are held.

We are of opinion the district judge did not err in concluding that, although this circumstance furnished him with a ground of exemption if he chose to avail himself of it, yet it did not affect his competency to serve as a jurymen in that court. He was, therefore, a competent commissioner.

The third section of the same act, authorizes any two of the commissioners to sign the assessment and report the same to the court.

2. As to the second class of opposition, the district judge observes, that this is the second report made by these commissioners; that the first report was referred back to them, with instructions as to the law that should guide them. That these instructions appear to have been regarded, and their report conformable thereto. And as to the alleged errors, in over or under valuing the property, it does not appear to him that they were such as to authorize his interference. The assessment, being the peculiar province of the commissioners, should not be disturbed except for manifest error, like the finding of a jury or the report of experts.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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15. The Supreme Court of the United States, (*Wallace vs. M'Connell*, 13 *Peters*, 136) held, that it is not necessary to allege and prove a *demand* of payment, in an action against the maker of a note or acceptor of a bill; but that it is matter of defence, if the defendant can show he was ready at the place of payment, and offered to pay, to be pleaded and proved on his

part. This court adheres to its former and contrary decision, in the case of *Mellen vs. Croghan*, 3 *Martin, N. S.*, 423..... *ib.*

16. Where notes for the price of bank stock are renewed, and the plaintiff's agent endorses them, gets them discounted in bank, and at maturity takes them up for his principal, they return with a subrogation to all the privileges; and the original holder can recover and enforce his privilege on the stock, against the maker and his vendee.

Saul vs. Nicolet's Ex'r. 246

17. When the plaintiff, by a special endorsement, parts with his interest to another, he must show title by a re-transfer. Mere possession of the note is not sufficient.....*Hart et al., vs. Windle*, 265

18. Where the endorsee is merely the agent of the plaintiff, the latter may sue in his own name: but such fact cannot be presumed; it must be alleged and proved..... *ib.*

19. So, in this case, it was alleged that the special endorsement of the plaintiff to G., was for the purpose of collection; but the fact was not proved, and the presumption resulting from possession, is insufficient..... *ib.*

20. Where a draft or order is not in its form negotiable, but if it is accepted payable to the order of the payee, it thereby becomes negotiable.

Crosby vs. Hearth, 304

21. In negotiable instruments, the plea of error or mistake is not available against an endorsee..... *ib.*

22. The law is well settled, that notice of the non-payment or dishonor of a bill, given to the drawer by the acceptor, or any of the parties to it, is sufficient, and enures to the benefit of all the other parties.

Union Bank vs. Grimshaw, 321

23. Letters written on the day the bills become due, by the acceptor and addressed to the drawer, that they must go back protested, is sufficient notice to him..... *ib.*

24. So, if a note or bill is presented in the forenoon of the day it becomes due, and payment is refused, notice given in the afternoon is good. *ib.*

25. Part payment, or a promise to pay a bill or note, furnish grounds to infer presentment and notice of the dishonor or non-payment..... *ib.*

26. So, where the defendant as drawer of bills, after being advised by letter from the acceptor of their dishonor, acknowledged the debt and promised to pay the holder of the bills, by instalments on short time, it must be viewed either as an admission that the notices were good, or a waiver of them..... *ib.*

27. Possession of a negotiable note endorsed in blank, will authorize the holder to recover on it, when his authority is not specially denied, or the contrary shown.....*Cotton vs. Union Bank*, 369

28. Where the notary states that he "demanded payment of the note at the Bank therein specified," it is a sufficient legal demand. *Carlile vs. Holdship*, 275
29. The holder of a negotiable note endorsed in blank, who possesses it in good faith and gave for it a good consideration, cannot be affected by any failure of consideration, between the parties to it and the original endorser or holder. *Hagan vs. Caldwell et al.*, 380
30. A draft drawn, payable at no particular time, may be considered at sight; and an acceptance payable four months after, is contrary to its tenor, and releases the drawer. *Burthe vs. Donaldson et al.*, 382
31. Where an undertaker of work drew a draft on the owner, stating "it was for plastering done on his building," the acceptance was an admission that the drawer was entitled to a privilege under the code, which passed to the holder of the draft. *ib.*
32. Where a bank receives a bill of exchange for collection, and fails to demand payment of the acceptor or maker, and not using the ordinary diligence to secure the liability of the parties to it, they make it their own, and become liable to the owner for the amount. *Armington's Executor vs. Gas Bank*, 414
33. The maker of a note cannot object to the insufficiency of the protest, because, whether the note is protested or not, does not increase his liability. *Cain vs. Morris*, 494
34. Protest is necessary to give interest, when none is stipulated; and is good to prove a demand, if specially denied. *ib.*
35. All the parties who are endorsers on a note or bill after the payee, must be governed in their liabilities by the *lex mercatoria*. *Gasquet vs. Oakey*, 537
36. The law and responsibility is the same between endorsers, whether they received the note or bill successively from each other in the usual course of business, or are mere accommodation endorsers. *ib.*
37. So, where the second endorser takes up a note after protest, he has his recourse against the first endorser, for the amount he has paid. *ib.*
38. Notice of protest left at the domicile or dwelling-house of the endorser, is sufficient. *Coulon vs. Champlin, et al.*, 544
39. The official character or signature of a notary, or other public officer in another state, need not be proved in regard to protests of foreign bills. This is an exception to the general rule, that all signatures and official capacities of public officers in another state, must be proved as other facts. This exception is made in aid of commerce. *Waldron et al. vs. Turpin*, 552
40. But in cases of promissory notes in another state, the protests do not make proof of demand of payment, and are not admissible in evidence, unless

the signature and official capacity of the officer making them, is attested and proved.....*Waldron et al. vs. Turpin*, 552

41. By the commercial law, a notary is not required to make a protest of a note or inland bill, as it is not considered an official act; and if a notary makes it and is living, the protest is not received as evidence itself of a demand, even if his signature and capacity are undisputed..... *ib.*

BROKERS.

1. Brokers are not licensed in this state, and, as such, are unknown to our law.....*Nott and Co. vs. Papet et al.*, 306

2. Brokers in this state buy and sell paper on their own account and that of others, and must be responsible as all other individuals..... *ib.*

3. And where a broker failed to disclose his principal at the time of sale of a promissory note, or show who he was at the trial, he was considered as having sold the note on his own account, and held responsible for its genuineness. *ib.*

CLERKS.

1. The article 782, of the Code of Practice, authorizes clerks to appoint deputies, who are to take an oath before the court in which they act; but when the clerk of the District Court is *ex officio* clerk of the Parish Court, his deputy may swear in, in either court, and the law is satisfied.

Bank of Louisiana vs. Watson, 38

2. The deputy clerk is an officer known to the law, and the court will take notice of his acts, when signing himself as "deputy clerk," without using the name of his principal..... *ib.*

COMMISSIONERS FOR OPENING STREETS.

1. The act of 1832, for opening streets in New-Orleans, requires that the commissioners of estimate and assessment should be competent to serve as jurors in the District Court; but a privilege of exemption from serving on the jury, does not render a person incompetent to serve as a commissioner.

Heerman's Heirs vs. Municipality No. Two, 597

2. The assessment of commissioners, under the act of 1832, for opening and improving streets in New-Orleans, is of their peculiar province; and like the finding of a jury, or the report of experts, it should not be disturbed except for manifest error *ib.*

COMPENSATION.

1. A sum due the defendant by the husband, cannot be pleaded in compensation of the wife's demand in her own right.

Defau et ux. vs. Pelane, 273

CONTINUANCE.

1. An affidavit for a continuance on account of the absence of a witness which does not state that his departure was unknown to the affiant, and that his testimony could not be had, is insufficient.

Bank of Orleans, vs. Whittemore, 276

CONTRACTS.

1. Under the Roman Law, no resolutive condition was implied in the contract of sale. If the *pactum commissarium* was not expressly stipulated, the vendor had no right to take back his property if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void..... *Canal Bank et al. vs. Copeland*, 75

2. Under the Louisiana law, the effect of the resolutive clause implied in all synallagmatic contracts is not to render the contract void *ipso facto*, but only voidable, on the demand of the party complaining..... *ib.*

3. Where the purchaser of a plantation and slaves, under mortgage for bank stock, stipulates that the seller may reserve certain slaves, and he (buyer) will put in others, and assumes her obligations to the bank, he cannot claim a rescission of the sale on an exception to her right to proceed against the plantation and slaves for the price, or damages in a direct action, on the ground, that she (the seller) has not transferred the bank stock; until he puts her in default, by showing a readiness and offer to perform, on his part, what by the contract he was first bound to do; or at least simultaneously, &c..... *Dawson vs. Duplantier*, 289

4. When no time is fixed by a contract, within which the mutual stipulations are to be performed, either party may claim an immediate performance, according to its terms, and in the mode pointed out by law for enforcing similar reciprocal engagements..... *ib.*

5. The same relief will be extended to an innocent party who has become responsible for the contracts of another, by accepting his drafts and giving him his credit, as to a surety, who even before payment, may demand to be indemnified by the principal debtor, when the latter is in a state of insolvency..... *St. John et al. vs. Sanderson: Cochran, Intervenor*, 346

6. A contract or agreement which has never been perfected, and not having been adhered to and signed by all the contemplated parties, is not binding on those who have signed..... *Faures vs. Coinçon*, 436

CORPORATIONS.

1. The banks retain the capacity to sue and stand in judgment, notwithstanding the suspension of specie payments by them for a longer period than that allowed by their charters..... *Union Bank vs. Macdonald*, 25

2. The third section of the act of the legislature, approved March 6, 1834, which authorizes the corporation of New-Orleans, to cause to be sold for

the account of whom it may concern, any objects or property whatever which encumber the levee, streets, &c., and are suffered to remain in these places for a longer time than the ordinances permit, is *unconstitutional*, and the owner may recover the value of the objects thus sold, from the corporation.....*Rost vs. Mayor et al.*, 129

3. The corporation possesses the power to abate nuisances, and of removing incumbrances from the levee, streets, &c. at the expense of the proprietor..... *ib.*

4. The liability of corporations is the same as natural persons, for the acts and neglect of their agents, when acting within the scope of their employment.....*Wart, f. m. c. vs. Barataria and Lafourche Canal Co.* 168

COURTS.

1. Suit was instituted for the whole amount of a policy of insurance, which the defendants had settled and paid, but the suit was instituted with the view to try a feigned case to see if the defendants were not entitled to retain nine hundred dollars, for brick taken from the old building to reconstruct the new houses: *Held*, that courts of justice will not entertain or act on a feigned case or suit, even with the consent of parties.

Kohn et al. vs. Louisiana Insurance Company, 86

2. Courts sit to administer justice in actual cases, and will not act on, or entertain feigned suits or cases, even with the consent of parties..... *ib.*

3. The rule of the Commercial Court authorizing either party, when the cause is at issue, to set it for trial on giving the opposite party three days notice, is not contrary to article 463 of the Code of Practice, requiring each suit to be called in its turn, and a day fixed for trial.

Green vs. Dakin & Dakin, 152

4. No evidence can be received in the Supreme Court, that a judgment, by consent, was entered up differently from the consent and agreement between the parties.....*Brand vs. Jones*, 449

5. The Probate Court can inquire into the validity of sales and titles to immoveable property, whenever the question arises collaterally in matters within its jurisdiction.

Badon's Heirs vs. Foucher et al. : H. Badon's Heirs, Interveners, 455

6. In a contest about the right and title to property, between two sets of heirs claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction..... *ib.*

7. The courts of this state will enforce an equitable right arising in another state, when the remedy is sought here....*Jackson vs. Tiernan et al.*, 485

8. The assignment of a part of a debt will be enforced in the courts of chancery, and by the courts of this state, where the obligation resulting

from the assignment of a part of the debt may be implied from the custom of trade, or the course of business between the parties

Jackson vs. Tiernan et al 485

9. The Probate Court is without jurisdiction or authority to compel property of an estate, which has been alienated by a co-heir and in the possession of a third person, to be brought into partition among all the heirs. It cannot inquire into the validity of title to real property, which is held by a party who is not an heir.....*Kemp vs. Kemp et al* 317

CURATORS.

1. Previous to the promulgation of the Louisiana Code and Code of Practice, the appointment of a *curator ad hoc* to an absentee was not authorized by law.....*State of Louisiana vs. Judge of the Parish Court*, 81

2. In an action of nullity, brought by the defendant therein to annul a judgment obtained against him as a citizen of this state, by *foreign creditors*, who never resided or owned property in Louisiana: *Held*, that the suit be sustained by the appointment of a *curator ad hoc* to the absentees..... *ib.*

3. Where a curator of an interdicted person is shown to have been regularly appointed, and *has acted*, and been recognized by the Court of Probates, in the exercise of his office, he will be presumed to have taken the necessary oath, although none is found in the record, and his acts will be deemed valid.....*Ball's Administratrix vs. Ball et al.*, 173

4. The oath of a curator is an important formality, not to be dispensed with; but when all the other proceedings had for the alienation of minors' or insane persons' property, have been conducted with the fidelity which an oath was intended to secure, purchasers will be protected under them, even if no oath be found... .. *ib.*

5. A provisional seizure is insufficient to bring an absent defendant into court; but when a *curator ad hoc* is appointed it is sufficient.

Derepas vs. Shallus, 371

6. Where the curator of a deceased plaintiff is made a party by order of court, after the *contestatio litis*, and is represented by counsel, the case is ready to proceed to trial, without any other delay or notice.

Carlile vs Holdship, 375

DAMAGES.

1. An action of damages for malicious prosecution and false imprisonment, should not be maintained without clear proof of *malice*, and the *absence* of probable cause of guilt.....*Maloney vs. Doane*, 278

2. Whether the defendant disclosed the ground, of his belief in his affidavit, charging the plaintiff with a criminal offence, is immaterial. In an action of damages for malicious prosecution, &c., he will be permitted to show his motives, and the absence of malice..... *ib.*

3. Legal interest is the only damages allowed for delay in the performance of an obligation to pay money, but cannot apply, or be taken as the measure of damages, when the obligation is destroyed by the dissolution of the contract, and in an action for the rescission of the sale..... *Derepas vs. Shallus*, 371

DONATION.

1. The universal legatee under a will, and a universal donee under a marriage contract, are, by mere operation of law, seized of the whole estate, and no demand whatever is necessary from the heirs at law.

Fowler et al. vs. Boyd, 562

2. So, where the husband and wife, in their marriage contract, made to each other mutual and reciprocal donations of the whole of each other's property, to vest in the survivor; on the death of the wife, the husband became the universal donee, and seized of her whole estate..... *ib.*

EVICION.

1. When the vendee has been evicted by an outstanding mortgage, and claims damages from his vendor, parole evidence is admissible to show the amount of damages actually sustained; notwithstanding the vendee may have been in arrears of interest or rent, at the time of eviction.

Bissell et ux. vs. Erwin's Heirs, 94

2. Where the vendee sues for damages on account of eviction, evidence to show a putting in default by the vendor in demanding rent or interest due, is not admissible. It can have no influence on the claim for damages, after eviction..... *ib.*

3. When the eviction is admitted by the pleadings, the production in evidence of the writ or execution under which the sheriff acted, is sufficient, without the judgment under which it issued..... *ib.*

4. The increased value of the property, forms a part of the damages assessed on the warranty, in case of eviction; but such increase only as the parties could have had in contemplation at the time of the contract, will be taken into the account..... *ib.*

EVIDENCE.

1. Evidence of the repeated acknowledgments of the maker of a note that he would pay it, is admissible to prove its execution, when the subscribing witness is incompetent to testify, from his relationship to one of the parties..... *Lopez's Widow and Heirs vs. Berghel, f. w. c.*, 42

2. But where the defendant expressly alleges his signature to the note sued on, to be forged, evidence of his acknowledgment will not be admitted, under article 325, of the Code of Practice..... *ib.*

3. The testimony of a deceased witness taken in writing on a former trial, is admissible in a subsequent trial.

Lopez's Widow and Heirs vs. Berghel, f. w. c., 42

4. The writ of seizure or execution, and the officer's return thereon, may be given in evidence without the judgment, when that appears in the record, although introduced for another purpose.

Bissell et ux. vs. Erwin's Heirs, 94

5. The rejection of irrelevant evidence, which if admitted could not have influenced the decision in the case, cannot be complained of..... *ib.*

6. Evidence of the acts or acknowledgments of a nominal party to a suit, touching a modification or new promises in relation to the original contract or transaction in question, will not be admitted..... *ib.*

7. Payment to a bank, like that to an individual, may be proved by parole evidence..... *Millaudon vs. Colla, 213*

8. Parole evidence cannot be received to prove in substance that a sale of a slave had been rescinded, or that the former vendor resumed possession as owner..... *Emmerling vs. Beebe et al., 251*

9. In an action by the owner of a slave for his hire and detention, a receipt of a third person, to show that he had released the defendants from the cause of action set forth by plaintiff, is inadmissible in evidence, as an attempt to prove title to the slave by incompetent testimony..... *ib.*

10. Where the plea of forgery is put in, supported by the oath of the party, it requires much stronger evidence to authorize a recovery, than in the ordinary case of a general denial..... *Robinson vs. Arnet, 262*

11. So, where the defendant expressly averred on oath, that his signature to the note sued on was a forgery, proof by witnesses who did not see him sign the note, but who only express their belief of its genuineness, from its similarity to signatures which *they had seen*, is insufficient to support the verdict of a jury..... *ib.*

12. Parole evidence was properly rejected, of the husband's consent to lose three per cent. per month on a note due to, and the sole property of his wife..... *Defau et ux. vs. Pelane, 273*

13. Parole evidence is admissible to show that the description of a lot, in an act of sale, was made through error and accident, and that the lot actually sold, was different from *that* described in the deed.

Palangue vs. Guesnon, f. w. c., 311

14. Where payment of the second, instead of the *first* note is made in error, the mistake may be proved by witnesses, and the error corrected, without affecting the liability of any of the parties to the note.

Union Bank vs. Slidell, 314

15. No evidence can be received in the Supreme Court, that a judgment by consent was entered up, differently from the consent and agreement between the parties..... *Brand vs. Jones, 449*

16. Evidence of demand, and the right to claim interest, results from the protest and act of sale, when the price is for immoveable property.

Barker, to use of Atchafalaya Bank vs. Banks et al., 453

17. The court cannot receive as proper evidence, any document or fact which the judge *a quo* states in his written opinion and judgment, to have been proven. It must appear by proof in the record, independently of his opinion or statement.....*Childress vs. Allin et al., 500*

18. So, where the judgment of a Parish Court is offered in evidence in the District Court, and is omitted to be copied into the record, and attested by the clerk or officer of the court, but is only embodied in the judge's opinion, it is insufficient, and cannot be used as evidence on the appeal.... *ib.*

19. Parole evidence is good to prove facts and circumstances of possession, at a time when the plaintiff's title was unknown, and when the parties could not be suspected of making evidence for themselves.

Devall vs. Choppin et al., 566

20. It is historically known that the Spanish Government never contested the validity of grants made to the French officers, before the Spaniards took possession of the colony of Louisiana, in 1769..... *ib.*

EXECUTION.

1. The return of *nulla bona* as to one of two defendants against whom a writ of *fieri facias* has issued, and the writ being stayed as to the other, a separate *ca. sa.* cannot legally issue. The execution must conform to the judgment, which is the sole authority that warrants the process. There being but one judgment, there can be but one execution and satisfaction.

Blanchard vs. Zacharie, 541

2. So, where a judgment *in solido* is obtained against three defendants, and separate executions issue, but stayed as to one, and as to the other two defendants returned *nulla bona*, and *ca. sas.* are taken out against each of them separately, one of which is stayed, and the other proceeded against until he gave bond and security for the prison limits: Held, to be illegal, and the surety in the bond discharged; because the plaintiff cannot have, at the same time, a *ca. sa.* against one, a *fi. fa.* as to a second, and proceedings suspended in relation to a third..... *ib.*

EXECUTORS.

1. An executor cannot be purchaser of the property of the estate he administers, when sold at public auction by order of the Court of Probates. He cannot be buyer and seller.....*Baldwin's Executors vs. Carleton, 394*

2. So, an executor who is a professional man, and renders legal services to the estate he administers, is not entitled to any separate compensation, according to the practice in England..... *ib.*

3. When an executor receives money of the estate, from a co-executor, or applies it improperly to his own use, it is considered still as money in his hands, as executor, for which he is accountable, and it may be recovered in the Court of Probates.....*Baldwin's Executor vs. Carleton*, 394

EXECUTORY PROCEEDINGS.

1. An order of seizure and sale against a third possessor for a sum assumed, but the amount of which is left doubtful, will be set aside, and the party informed that his only remedy is by an ordinary suit.

Dupuy vs. Dashiell, 124

2. A supplemental petition for a new order of seizure and sale is admissible, if it do not alter the plaintiff's original demand, but is only a continuation of it, embracing instalments not due, when the first was filed.

Mader et ux. vs. Fox, 132

3. In computing the distance and notice of seizure to which the possessor of mortgaged property is entitled, when he lives more than twenty miles from the residence of the judge granting the order of seizure, the ordinary road used for travelling is to be taken, although there may be a shorter one but seldom travelled.....*Woodward vs. Dashiell*, 184

4. The want of amicable demand is not sufficient ground to enjoin proceedings on an order of seizure and sale..... *ib.*

5. Where the third possessor assumes to pay the original vendor, he becomes the immediate debtor of the latter, who may proceed directly against him and the property, without notice to the original debtor..... *ib.*

6. The law requires a demand of thirty days of the original debtor and mortgagor, whether it be his own notes or those he assumed to pay, before issuing executory process against the third possessor.....*Valetti vs. Gurlie*, 183

7. It is not sufficient in the executory proceeding to show that the notes which the debtor or mortgagor assumed to pay, have been protested, but that the debtor himself was in default, thirty days before proceeding against the third possessor..... *ib.*

8. In an opposition arresting an order of seizure and sale, the issue is, as to the rights of the plaintiff, to proceed with his order of seizure, and not as respects the distribution of the proceeds of the property when sold; and especially among parties not before the court.

Hozey, sheriff etc. vs. M'Dougal et al., 353

9. In the executory process, no copy of the petition is required to be served on the defendant. A simple notice is necessary.

Exchange and Banking Company vs. Walden, 431

10. The article 739 of the Code of Practice points out the only reasons for which the sale, by the executory process, of mortgaged property, may be arrested..... *ib.*

11. Where the vendee and endorsers on notes secured by mortgage, are parties to the act of sale, it is not necessary that it be expressed therein, that they endorsed the notes, to enable the vendor to proceed by the executory process..... *Barker, to use of Atchafalaya Bank vs. Banks et al*, 453

12. In the executory proceedings on an act of sale containing the pact *de non alienando*, against mortgaged property in the hands of the last vendee, in which no notice is required, the latter is not bound to call his vendor in warranty..... *Carter vs. Caldwell*, 471

FRAUD.

1. A party suffering from the fraud of another, is entitled to relief; and where fraud would vitiate a sale of goods as between the original parties, a third party, on whose credit they were purchased and assumed payment, should not be made the victim of the fraudulent acts of the purchaser.

St. John et al. vs. Sanderson; Cochran, Intervenor, 346

2. In questions of fraud which are particularly the province of a jury, their verdict must be conclusive, unless clearly against the evidence.

Passebon vs. His Creditors, 438

GARNISHEES.

1. A garnishee cannot withhold funds claimed by intervenors, whose claim is dismissed and pending on appeal. It does not suspend the execution of the plaintiff's judgment against the defendant and original debtor, in which the funds were attached.

Carman et al. vs. Anderson et al.: Bogart garnishee, 136

2. When judgment has been rendered against the defendant, proceedings may be immediately had against the garnishees to pay over the funds or effects even before final judgment is signed.

Burke, Watt & Co. vs. Taylor: N. & E. Ford & Co., garnishees, 236

3. If the answers of garnishees state facts which the plaintiffs attempt to disprove, it is a proper case for a jury; but when the question is entirely one of law, relating to the sufficiency of the answers and the legal inferences deducible from them, the court will decide..... *ib*

4. The promise of garnishees to pay the defendant's drafts or bills, can give them no privilege on any funds of his coming into their hands, over third persons or attaching creditors, who seize them before actual payment; and if they subsequently pay them, they cannot plead compensation to the vested rights of attaching creditors..... *ib*.

5. Garnishees may show, when called on to pay, that the defendant sued as absent, was in fact dead, at or before the institution of suit, and that, consequently, a payment by the garnishees would not be valid.

Allard vs. De Brot: Merle & Co. garnishees, 253

HABEAS CORPUS.

1. No appeal lies from proceedings had on a writ of *habeas corpus* in a criminal case, or for detention in disobedience to police regulations, and the like cases.....*State of Louisiana vs. Judge of Commercial Court*, 192
2. Civil cases are essentially those in which the defendant, or party against whom relief is sought by *habeas corpus*, is a natural person, or corporation other than the State..... *ib.*

HEIRS.

1. Heirs who are of age, and parties to a provisional partition, cannot complain: but minors and co-heirs not made parties, are not concluded, and their portions in a final partition, ought to be made up to them, according to the principles of equity.....*Kemp vs. Kemp et al.*, 517
2. The proceedings in the Probate Court, where the succession of the deceased was administered, recognizing the heir, together with the testimony of witnesses well acquainted with the family, are sufficient to authorize the heir to sue and maintain an action in his own name, for debts owing the succession.....*Addison vs. New-Orleans Savings Bank*, 527
3. The lawful heir inherits the succession from the moment it is opened, and this right is acquired by the operation of law alone, before he has taken any steps to put himself in possession..... *ib.*
4. One of the effects of the right of the heir to a succession, is to authorize him to institute all the actions which the deceased had a right to, and to prosecute those already commenced..... *ib.*
5. The absence of heirs will not be *presumed* in all cases of an intestate succession, and less so in a case where the contrary is shown..... *ib.*

HUSBAND AND WIFE.

1. Where the wife claims a separation from bed and board, on the ground of repeated acts of ill treatment and cruelty by her husband, which is supported by evidence, and there is no hope of living in peace, she will be entitled to relief.....*Headen vs. Headen*, 61
2. The act of the wife *retracting* her renunciation of her right of mortgage on her husband's property, must be made contradictorily with the creditor in whose favor she has renounced; so far, at least, that he should be notified of the passing the act of *retraction*....*Landry vs. Segond*, 154
3. Without notice to the creditors of the passage of the *act of retraction of the renunciation* of the wife, it will not interrupt the prescription of forty days within which it must be passed, under the act of 27th March, 1835.... *ib.*

IMPRISONMENT FOR DEBT.

1. The imprisonment of the debtor at the instance of a creditor, on a charge of fraud under the 10th and 11th sections of the act of March 20, 1840, abolishing imprisonment for debt, is essentially a civil suit by creditors against their debtor, to prevent the abstraction of his property, and in which an appeal lies to the Supreme Court.

State of Louisiana vs. Judge of the Parish Court, 531

INJUNCTION.

1. The act of 1831, section 3, allowing interest and damages on the dissolution of an injunction, does not apply to an opposition and injunction, to stay an order of seizure and sale.....*Dashiell vs. Lesassier*, 101

2. The plaintiff, in an opposition and injunction against an order of seizure and sale, may *discontinue* his suit without being required to pay either special or other damages, as it is only incidental to the hypothecary action, and he gives no security bond..... *ib.*

3. An injunction will not be dissolved, when the party is immediately entitled to a new one.....*Woodward vs. Dashiell*, 184

4. So, where an injunction was properly obtained, but it became necessary that it should be dissolved, no damages should be allowed..... *ib.*

5. A judgment by default cannot be taken by the plaintiff, in an opposition and injunction to an order of seizure and sale. No answer is required: a rule taken by the adverse party to dissolve the injunction, is equivalent to an answer, and the injunction may be tried summarily.

Dawson vs. Duplantier, 289

6. The trial of a rule taken to set aside and dissolve an opposition and injunction staying executory proceedings, is a trial on the merits, in which the plaintiff therein is called on to support the grounds of his opposition by evidence..... *ib.*

7. Want of amicable demand, does not authorize an injunction to prevent or delay the payment of a debt.

Exchange and Banking Co. vs. Walden. 431

INTEREST.

1. A party cannot recover back usurious interest or discount which he has voluntarily paid, either by a direct action or exception.

Merchants' Bank vs. Gove, 378

INTERROGATORIES.

1. Where a firm is interrogated on facts and articles, and one of the partners answers categorically, it is sufficient, unless each of the partners have been expressly called on to answer.....*Tiernan et al vs. Nee*, 119

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2. The right of being present when interrogatories are answered, is secured only to the party who requires his adversary to answer in open court.....*Tiernan et al. vs. Noe*, 119
3. Where the plaintiff's attorney consented that the facts set forth in certain interrogatories propounded to them by the defendants, touching the ownership of the notes sued on, should be taken for granted, in order to prevent delay in the trial, the admission or confession cannot be recalled or disregarded, and the adverse party may avail himself of it after judgment.
Shipman & Ayres, vs. Haynes et al., 363

JUDGMENT.

1. Where the plaintiffs discontinue their suit, and afterwards revive or renew it on a rule to show cause, served on the adverse party and obtain judgment, which, although not appealed from, it is insufficient on which to found an action against a third possessor..*Gilbert et al vs. Nephler & Boyle*, 59
2. When a judgment is relied on as the only evidence of a debt, for which the property of a third possessor is attacked, it is but fair, and he has the right to open it, and inquire into the manner in which it has been obtained..... *ib.*
3. Where judgment, set up as the basis of an action against third persons, is attacked as fraudulent and collusive, it devolves on the party offering it, to prove his debt or demand by legal evidence..... *ib.*
4. The amount of a judgment having been paid, the defendant therein took an appeal, and had it reversed: *Held*, he should recover back the sum paid, on showing these facts.....*Mooney vs. Corcoran*, 46
5. Where a party claimed title to a piece of land, or a sum of money for work and labor done on it, and propounded interrogatories to his adversary to establish his claim, the answers to which negatived title, but left the money demand doubtful, and the judge found a less sum than that claimed, judgment thereon was not disturbed.....*Whitehead vs. Albriton*, 20
6. Where judgment by consent was entered up for a thousand dollars less than the amount of the note sued on, this court altered the judgment to the true sum, without it being specified or asked in the petition, when it appeared from the notes annexed.....*Brumfield vs. Mortee's Adm'r.*, 116
7. Where the evidence is contrary to the judgment appealed from, it will be reversed, and such a one rendered as is supported by proof in the record.....*McCoy's Executors vs. Byrne*, 366
8. No evidence can be received in the Supreme Court, that a judgment by consent, was entered up differently from the consent and agreement between the parties.....*Brand vs. Jones*, 449

9. A judgment of the inferior court cannot be corrected and amended in the Supreme Court, even by consent.....*Brand vs. Jones*, 449
10. Where a case presents merely a question of fact, the judge *a quo*, who heard the witnesses, and saw the manner they testified, is more competent to judge of the degree of credibility to be given to their testimony, than this court, and his judgment in doubtful cases should be affirmed.....*Goulé & Lambert vs. Vidal et al.*, 479
11. A judgment which is reversed by the Supreme Court and remanded for a trial *de novo*, does not settle the rights of the parties, and form *res judicata*.....*Jackson vs. Tiernan et al.*, 485
12. The premature signing of judgment, as between the parties, is not assignable as error.....*Opothlarholer et al. vs. Gardiner*, 512
13. Where two of the original plaintiffs in a *joint action*, died after judgment, and a rule taken by the others on the surety in the bail bond to show cause why he should not pay their joint share of the judgment: *Held*, that the judgment severed their *joint interest*, and that each has a right to recover his *virile* share from the surety..... *ib.*

JURISDICTION.

1. The courts of general jurisdiction are the proper tribunals to take cognizance of partitions of partnership property, either in kind or by licitation, even if some of the members of firms composing the partnership are dead, and their estates in the hands of executors or administrators.
Gordon et al. vs. Dick et al., 33
2. The Parish Court of New-Orleans has concurrent jurisdiction with the First District Court, in all cases within the limits of said parish, and which extends to actions for partition of property held in common, even if any or all the parties defendants be minors, or persons residing without the limits of the state..... *ib.*
3. The jurisdiction of the Probate Court, as defined in the Code of Practice, article 924, No. 14, is confined exclusively to partitions of successions, which are the peculiar objects of that court..... *ib.*
4. The Probate Court is without jurisdiction in an action against a third possessor of property sold by a tutor, when the object of the suit is to annul certain proceedings of that court releasing the general mortgage of the minor, and to subject the property to his claim, under his mortgage against the tutor..... *Lesassier vs. Lesassier et al.*, 55
5. The third possessor was no party to the probate proceedings sought to be annulled, and is not connected in any way with the acts of the tutor; nor has he done any act under the authority of the Court of Probates..... *ib.*

6. Courts of Probate have no jurisdiction against third possessors of property claimed as part of a succession, or under a mortgage against a tutor. If it were otherwise, defendants would be deprived of important means of defence, as fraud and collusion, and the trial by jury.

Lesassier vs. Lesassier et al. 55

7. The Court of Probates is *without* jurisdiction in an action on an appeal bond, or to try a rule against the surety therein, to render him liable for the judgment against his principal, although the *appeal was taken from that court*.....*Elkins' Heirs vs. Berry*, 358

8. Where heirs sue their co-heirs for a partition of property inherited from their common ancestor, in the Probate Court, and another set of heirs intervene and claim title to one-half of the property, under another and different ancestor, it involves questions of title, which must be brought before the courts of ordinary jurisdiction.

Badon's Heirs vs. Foucher et al. : H. Badon's Heirs, Interveners, 455

9. In a contest about the right and title to property between two sets of heirs claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction..... *ib.*

10. So where one set of heirs intervene in the Probate Court, and claim title to half the property, in an action of partition between co-heirs inheriting from different ancestors, their petition of intervention will be dismissed for want of jurisdiction..... *ib.*

See COURTS.

JURORS AND JURY.

1. When there is not a sufficient number of jurors, of the regular panel, in attendance, no matter from what cause, the court is authorized to call on bystanders. *Rondeau et al. vs. New-Orleans Improvement and Banking Co.*, 160

2. It is not good cause of challenge, that a juror has been summoned as a witness by either party. Jurors may be sworn to give evidence to their fellow-jurors..... *ib.*

3. A question of fraud is the peculiar province of the jury, and their verdict will not be disturbed when generally supported by the evidence.

Lambeth & Thompson vs. McMurray et al., 466

4. Judgments founded on the verdicts of juries, should never be brought before the Supreme Court without showing that an unsuccessful attempt has been made to obtain a new trial..... *ib.*

5. The verdict of the jury, in two trials, on mere questions of fact, when not clearly erroneous, will not be disturbed.....*Bernard vs. Pyburn*, 126

LAND TITLES.

1. The plaintiff claims a back concession of forty arpents, under a Spanish grant made in 1796, which runs into the defendant's tract front-

- ing on Bayou Lafourche, and which was set off by the king's surveyor in metes and bounds, to certain settlers or colonists, without any regular grant, in 1779: *Held*, that this title is superior, and will hold the land against the Spanish grant of subsequent date.....*Landry vs. Martin et al.*, 1
2. The Spanish government recognizes verbal, as well as written grants to land; and a verbal grant, set off by the king's surveyor, passes all the right of the king to the domain, which cannot be subsequently granted by any of his governors..... *ib.*
3. After long and continued possession of land for nearly half a century, if a written title were necessary, the testimony of witnesses, after the loss of the archives and titles, will authorize the court to presume it..... *ib.*
4. Under the Spanish laws, a title to immoveable property may be shown by parole evidence.....*Same Case*, 10

LAWS.

1. The Civil Code of 1808, is a digest of the civil laws which were in force in Louisiana; and the re-enactment of them did not repeal the exceptions which limited their operation under the Spanish jurisprudence.
Verret et al. vs. Theriot, 106
2. So, the provision in article 227, page 258, of the old Code, that the surviving husband or wife who marries again, is forbidden to dispose of the property inherited from any of the deceased children of the first marriage, it being *reserved* to the children of that marriage, is taken from the 15th law of Toro..... *ib.*
3. The Spanish laws make an exception, that the surviving spouse, on marrying again, is not bound to *reserve* property of his deceased child of the first marriage for the other children of that marriage, when it has been *acquired otherwise* than by inheritance from the deceased parent. It becomes the absolute property of the survivor, if it has been *purchased* by the deceased child, from the moment of his death..... *ib.*

LEGATEE.

1. It is only from the forced heirs that a universal legatee is bound to demand the delivery of the property bequeathed to him; and if there be no such forced heirs, he is seized of right of the estate, and no demand is required.....*Fowler et al. vs. Boyd*, 562
2. So, the universal legatee under a will and a universal donee under a marriage contract, are by mere operation of law seized of the whole estate, and no demand whatever is necessary from the heirs at law..... *ib.*

MANDAMUS.

1. A *mandamus* will not be allowed to compel the judge of an inferior court to proceed in the trial of a cause forthwith, in which he has granted a continuance.....*State of Louisiana vs. Judge of the Parish Court*, 521
2. No appeal lies from the continuance of a cause, when there has been no final judgment..... *ib.*

MINORS.

1. A minor not emancipated, is not bound by mercantile contracts; nor by an engagement to enter into a partnership to carry on mercantile business.....*Willet vs. Tessier*, 13
2. Minors not emancipated are incapable, even with the authorization of their tutors, to make valid contracts in relation to business or mercantile transactions. *ib.*
3. No consent of the father or tutor of a minor can remove the disabilities of minority. If it could, it would amount to a verbal emancipation, which is forbidden by law..... *ib.*

MORTGAGE AND PRIVILEGE.

1. A mortgage executed after the debtor has sworn to his schedule and applied for the benefit of the insolvent laws, is invalid, as a disguised attempt to give a preference to this creditor over others, after a sworn declaration of bankruptcy.....*Granet vs. His Creditors*, 122
2. Where a mortgage has been raised and cancelled under defective powers, by an attorney in fact, yet when actually cancelled under them, and subsequently released by the mortgagee, purchasers, in the mean time, of the property, will be protected.....*Ball's Administratrix vs. Ball et al.*, 173
3. Where a third possessor of mortgaged property, *assumes*, to pay the original vendor, he becomes the immediate debtor of the latter, who may waive his rights upon his vendee and proceed directly against the third possessor, without the notice required by the 69th article of the Code of Practice.*Woodward vs. Dashiell*, 184
4. The renewal of notes given as evidence of an hypothecary or privileged debt, and an extension of time, is not *per se* a novation or extinguishment of the mortgage or privilege.....*Saul vs. Nicolet's Executors*, 246
5. The vendor has no privilege or lien on the furniture in the house when it is abandoned or let by his vendee, and he sues for a rescission of the sale. He can only claim his rents or fruits while the vendee had it in possession. The privilege grows out of the contract of lease, between landlord and tenant.....*Derepas vs. Shallus*, 371
6. Where a plasterer drew a draft on the owner, and stated in it, that "it was for plastering done on his building," the acceptance was an admission

that the drawer was entitled to a privilege, under article 3216, number 2, of the Louisiana Code, and which passed to the owner of the draft.

Burthe vs. Donaldson et al. 382

7. The purchaser of property previously mortgaged takes it subject to the balance due on such mortgage, whatever it may be, and retains this sum in his hands over and above the price he bids, to be paid to the rightful owner.....*Alling et al. vs. Beamis*, 385

8. A purchaser of property subject to a lien or privilege, is liable for the amount, and will be compelled to pay it, or give up the property.

Diggs vs. Green et al., 416

9. Where the evidence shows that the husband has received and converted to his own use the paraphernal property of his wife, in case of his insolvency, her heirs will have a legal mortgage, superior to that of other creditors, on his estate for its restitution.....*St. Martin vs. His Creditors*, 419

10. The article 739 of the Code of Practice points out the only reason for which the sale of mortgaged property, by the executory process can be arrested.....*Exchange and Banking Company vs. Walden*, 431

11. A mortgage for a principal sum, secures also the interest and costs in enforcing payment..... *ib.*

12. Taking a note in renewal of one secured by mortgage, is no novation when the first one is not given up..... *ib.*

13. The court cannot inquire into the terms and conditions on which property mortgaged by special privilege should be sold, which has been given up to the creditors by a *concordat*.....*Hodge vs. Whitall*, 506

14. If the property mortgaged and ordered to be sold to satisfy the judgment, is not sufficient, the defendant not being released by the *concordat*, will be personally bound to pay the balance due on the judgment, if there be any..... *ib.*

15. A creditor for supplies furnished a ship or vessel, has a privilege on the vessel for those furnished before her departure, if she has already made a voyage; but this voyage must be considered as made to another port, and a return to the port of departure before it is completed; otherwise this privilege could never be claimed or enforced.....*Blake vs. Bredall*, 545

16. Every claim against a vessel or steamboat depending on the last voyage, for wages, supplies, &c., for which the Code gives a privilege, will be allowed, when the services or supplies have been rendered or furnished within, and during the last sixty days before suit.....*Shirley vs. Fabrique*, 140

17. The purchaser of a specific, but undivided portion of a square of ground, for a particular sum or price, and gives his obligations with mortgage to secure payment, this mortgage only extends to his portion or interest, and cannot be enforced in the executory proceedings, for any of the obligations of his co-purchasers, although the sale and mortgage is all included in one and the same act.....*Walton & Kemp vs. Lisardi et al.*, 588

18. It was the intention of the parties to acquire such distinct portions of the property conveyed, as might have been made the subject of separate deeds of sale, and that although undivided, the square of ground cannot be said to have been purchased in common; and the payment of the notes of any one purchaser extinguishes the mortgage as to his part, and gives him an absolute and distinct title..... *Wallon & Kemp vs. Lisardi et al.*, 588

19. Although a mortgage is indivisible, and prevails over each and every portion of the property, yet when the obligations given for a part only, of the whole property, are paid, the mortgage being but the accessory, is extinguished *ib.*

20. So, where co-purchasers of distinct and separate portions of undivided property, jointly mortgage it to secure payment of the price, yet when any one pays for his portion, the mortgage is extinguished as to that part. *ib.*

NOVATION.

1. The mere renewal of notes with an endorser, and making partial payments, does not operate a *novation*, nor deprive the vendor of his privilege on the thing sold, in the hands of the vendee.

Saul vs. Nicolet's Executor, 246

2. So the renewal of notes given as evidence of an hypothecary or privileged debt, and an extension of time, is not *per se* a novation, or extinguishment of the mortgage or privilege..... *ib.*

OBLIGATION.

1. The promise to pay a debt at certain periods, if a note given to the creditor for collection was *not collected*, is not absolute but conditional; and as the collection of the note would have extinguished the debtor's obligation, so if it has not been collected, through the fault of the creditor, the consequence must be the same..... *Moore et al. vs. Cochran*, 233

2. Where a note is given in consideration of the plaintiff's promise to have a certain tract of land laid off into town lots, and the share of each subscriber conveyed to him, it is a contract creating reciprocal obligations, and the plaintiff is bound to convey, or show his readiness and ability to perform his part of the contract; and failing to do so, cannot recover on the note..... *Brashear vs. McMasters et al.* 282

3. In contracts containing reciprocal obligations, the party bound to convey must convey, or show his readiness and ability to perform his part of the contract, before he can compel the other to pay the price..... *ib.*

OFFICERS.

1. A sheriff, who is the nearest relation, and son of one of the parties, is not incompetent to act and execute process in the case. It is a pecuniary interest alone that renders him incompetent. *Dawson vs. Duplantier*, 289

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2. The signatures and official capacities of public officers, purporting to act as such in foreign countries, must be proved, *when contested*, in our courts, as other facts. There is an exception as to notaries or others protesting bills of exchange. *Waldron et al. vs. Turpin*, 552

3. The acts of an officer to whom a public duty has been assigned are *prima facie*, taken to be correct, and within his power and authority. *Devall vs. Choppin et al.*, 566

4. It is historically known that the Spanish government never contested the validity of grants made by the French officers, before the Spaniards took possession of the colony of Louisiana in 1769. *ib.*

PARENT AND CHILD.

1. The provision in the Civil Code of 1808, article 227, page 258, forbidding the surviving husband or wife who *marries again*, from disposing of the property of any deceased child of the *first* marriage, but requiring it to be held and *reserved* for the other children of that marriage, is taken from the 15th law of Toro. *Verret et al. vs. Theriot*, 106

2. The Spanish laws make an exception, that the surviving parent on marrying again, is *not bound to reserve* the property of his deceased child of the *first* marriage for the other children of that marriage, when it has been *acquired otherwise* than by inheritance from the deceased parent. It becomes the absolute property of the survivor, if it has been *purchased* by the deceased child, from the moment of his death. *ib.*

PARTITION.

1. Partial and provisional distributions of property among co-heirs do not amount to a final partition; is not conclusive on those not parties, and the property in possession of the co-heirs is liable to be brought into a final partition. *Kemp vs. Kemp et al.*, 517

2. The Probate Court is without authority to compel property of an estate which has been alienated by an heir, and in the possession of a third party, to be brought into partition, among all the heirs. *ib.*

3. Heirs who are of age, and parties to a provisional partition, cannot complain; but minors, and co-heirs not made parties, are not concluded; and their *portions* in a final partition ought to be made up to them according to the principles of equity. *ib.*

PARTNERSHIP.

1. The members of a firm doing business as carpenters, and signing the name of their firm to a note, are only liable *jointly*, and not jointly and severally. *Heath et al. vs. Howell & Johnson*, 138

2. The members of a firm doing business as architects, and signing notes

for the price of immoveable property purchased by them in the name of the firm, are only bound *jointly*, and not *in solido*.

Green vs. Dakin & Dakin, 152

3. Where partners carry on a rum distillery, and one of them, who is in the habit of buying molasses for the concern and drawing drafts on his co-partner, draws a draft for a quantity of molasses, which is delivered and used, and the co-partner refuses to accept it: *Held*, that they are both liable, and bound *in solido*, nevertheless.....*Pugh vs. Priestly et al.*, 287

4. An association for the purpose of carrying on "the cotton pressing business," is an ordinary partnership; and an acceptance by the firm, only binds each partner for his proportion of the debt.

McAuley vs. Barnes, 427

5. Where judgment is prayed *in solido*, against the members of a firm, and one of the defendants denies his liability *in solido*, his firm being only a particular, not a commercial partnership, he must show that both partners consented to the obligation, or that it was contracted for the benefit of the firm.....*Derbigny vs. Mondelli et al.* 496

6. So, where judgment is asked against the members of a firm *in solido*, and for *general relief*, and one of them denies his liability for the whole debt, on the ground that it is only a particular partnership debt, evidence of the consideration of the obligation will be admitted, to show his liability *in solido*, the debt having been contracted for his benefit..... *ib.*

7. Where a concordat was made by J. E. W., one of the members of the firm of W. J. & Co., and charged with the administration of the affairs of said firm, &c., of the one part, and the creditors of said firm, of the other, in which a full and entire acquittance and discharge, as well to the said J. E. W., as to the members of said firm, individually and jointly, of all claims, debts, and demands whatsoever," is granted: *Held*, that the parties of the second part acted only in the capacity of "creditors of the firm," and that J. E. W. was not thereby released from an individual debt, owing to an individual creditor, who was a party to the concordat.

Hodge vs. Whital, 503

PAYMENT.

1. Where payment of the second, instead of the first note, is made in error, the mistake may be proved or shown by witnesses, and the error corrected, without affecting the liability of any of the parties to the note.

Union Bank vs. Stidell, 314

2. The payment being made in error, did not extinguish the obligation evidenced by the note, nor the mortgage which was its accessory..... *ib.*

POSSESSION.

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| 1. The possession of a usurper enures to the benefit of the real owner ; and his bad faith cannot in any manner destroy or impair the right of possession, previously held in good faith..... | <i>Devall vs. Choppin et al.</i> , 581 |
| 2. But where the possession may have been obtained in bad faith ; or the possessor may have been guilty of fraud when he acquired his title, yet third persons not claiming under the same original title, or the party in whom it vested, cannot inquire into its defects or relative nullities. This can be done only by those who have suffered from his acts..... | <i>ib.</i> |
| 3. No relative nullities in titles or deeds, accompanied with possession, even those resulting from fraud, can be inquired into collaterally..... | <i>ib.</i> |

PRACTICE.

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| 1. As soon as the ten days allowed for delay expire, after service of citation, if the court is in session, the plaintiffs may take judgment by default, if there is no answer filed..... | <i>Carmena vs. Mix</i> , 165 |
| 2. This court will not travel out of a bill of exceptions to notice objections which were not made in the court below. Had they been suggested there, they might have been removed..... | <i>Ball's Administratrix vs. Ball et al.</i> , 173 |
| 3. The plea of the general issue and averment, that certain goods described in the petition, were tendered and delivered, does not admit their value, as alleged by the plaintiffs, and dispense with proof of it.
<i>McMaster & Hyde vs. Brander et al.</i> , 206 | |
| 4. Without an answer filed or judgment by default, no reference or submission to arbitrators can be made in a cause ; and such a submission may be assigned for error..... | <i>Perret & Gally vs. Keill & Co. et al.</i> , 209 |
| 5. When there is no <i>contestatio litis</i> , or judgment by default, all the subsequent proceedings are irregular and void..... | <i>ib.</i> |
| 6. In an action of damages against the masters and owners of two ships for collision, and injury of the plaintiff's vessel, when he had offered all his evidence, one of the defendants, (who severed in their pleas,) moved and obtained a judgment of non-suit, and the other was permitted to introduce evidence proving his own innocence, and showing that the conduct of the defendant obtaining the non-suit, was the remote cause of the collision and injury complained of.
<i>Toulman et al., Owners of the Brig Hokomok, vs. Elliott et al., etc., etc.</i> , 226 | |
| 7. It is within the discretion of the court to allow or cause a witness to be called and sworn after the evidence of both parties has been closed and the arguments progressed, if the court is of opinion more light and information is needed on the matter in contest..... | <i>ib.</i> |

8. A new trial is within the sound discretion of the court, which will not be interfered with unless there is manifest error.

Toulman et al., Owners of the Brig Hokomok vs. Elliott et. al., etc. etc., 226

9. A non-suit legally obtained, the party cannot be deprived of it in the same suit..... *ib.*

10. Where the judgment of the inferior court states, that "the plaintiff proved all his allegations," and there is no proof of the signature of the first endorser of the note, in the record, the case will be remanded for a new trial..... *Florance vs. McFarlane*, 231

11. The plea of the general issue dispenses with proof of the signature of the maker of a note, but not that of the payee and first endorser..... *ib.*

12. Where a special defence is set up, it may be considered a waiver of the plea of the general issue..... *Bank of Orleans vs. Whittemore*, 276

13. The judge *a quo* possesses discretionary powers of enlarging a rule and postponing a trial, giving further time for hearing the parties; and when this discretionary power is exercised, this court will not interfere by granting a *mandamus* commanding him to proceed instantler.

State vs. Judge of Parish Court, 284

14. Where it appears from the record, that complete justice has not been done between the parties, and the trial being by jury, the court will not render final judgment, but remand the case for a new trial.

Terrill vs. Bonnabel, 317

15. The defendants cannot avail themselves of a defence against their liability to pay a certain sum, on the ground that the plaintiff's agent who employed them, was indebted to them, when this matter is not specially pleaded. The plea of the general issue is not sufficient.

Cotton vs. Union Bank of Louisiana, 369

16. The defendant may bond his property, but the plaintiff is never allowed the possession of it. He can only demand that it be sold, if it be of a perishable nature..... *Comstock et al. vs. Paie*, 481

17. A person suing as administrator may, if the evidence shows it, recover the sum claimed in his own right.

Childress, Administrator, &c. vs. Davis & Webb, 492

PREScription.

1. Where a party holds and possesses property honestly, and by virtue of a contract of a sale, regular in point of form, without notice of the plaintiff's claim, and having retained possession, publicly, without interruption, and in good faith, for more than ten years, he acquires a title by prescription..... *Verret et al. vs. Theriot*, 106

2. In whatever place the defendant may reside, the prescription of five years runs in his favor even against minors, and persons interdicted.

Tyson vs. McGill, 145

3. A conditional offer by defendant, in a conversation with the plaintiff's counsel, "that he would pay the note if long time enough was given," does not amount to a new promise, so as to take the case out of prescription and entitle the plaintiff to recover.....*Tyson vs. M'Gill*, 145

4. Prescription is an exception which does not touch the merits; and when this exception is overruled, the party should be heard on the merits.
Lang vs. Kimball, 200

5. Where prescription is first pleaded in the Supreme Court, and it is necessary to remand the case for a new trial on this plea, the party for whose benefit it is, must pay the costs of the appeal.
Parmele & Baker vs. Johnston, 429

6. Prescription is interrupted by a suit in the United States Court sitting in another state.....*Jackson vs. Tiernan et al.*, 485

7. The plea of prescription should be explicit and special; so that the party against whom it is opposed may be put on his guard, in order to enable him to show that the prescription had been interrupted.
Blake vs. Bredall, 550

8. The possession of an usurper, or person under a defective *meene* conveyance, and who is evicted, will not interrupt prescription, as against the rightful owner or proprietor, when they both claim under the same original title.....*Devall vs. Choppin et al.*, 566

9. So, where the original possession was in good faith, although an intermediate possessor of the premises held in bad faith, the subsequent possessor in good faith can avail himself of the prescription applicable to such possession..... *ib.*

10. If the possession has commenced in good faith, and it is afterwards held in bad faith, that will not prevent the prescription, even if the possessor's title was fraudulent, and he knew another person had a better title. *ib.*

11. To support the long prescription of thirty years, possession only, without title or good faith, is necessary; but continuous and uninterrupted possession under a legal title, derived from the original grantee, with certainty in the object, and good faith in the first and subsequent possessors, will support the prescription of ten years..... *ib.*

12. Where the possession has not always been a *corporeal one*; but when it becomes necessary to complete a possession already begun, the civil possession will suffice..... *ib.*

PRINCIPAL AND AGENT.

1. The liability of corporations, is the same as natural persons, for the acts and neglect of their agents, when acting within the scope of their employment.....*Ware f. m. c. vs. Barataria and Lafourche Canal Co.*, 169

2. Masters and employers are responsible for the damage occasioned by their servants and overseers, in the exercise of their functions; but this liability only extends to cases where the master or employer might have prevented the act which caused the damage, and did not.

Ware, f. m. c. vs. Barataria and Lafourche Canal Co., 189

3. So, where a lock-keeper, instead of attending to his duties, assaults and causes damage to a passenger, even under pretext that the latter has not paid his toll, he alone is responsible for the damage, and not his employers..... *ib.*

4. Where an agent is employed to buy a quantity of fish, in barrels, with discretionary powers to do the best he can in executing the order, and he procures fish which have passed inspection, but, in consequence of the barrels not retaining the brine, the greater part of the fish are spoiled on the arrival, and sold at great loss: *Held*, that this is not such a degree of negligence on the part of the agent as will authorize a recovery in damages..... *Forstall et al. vs. Fowle*, 299

5. A party to a contract, who denies that he acted as principal, must show that he made this known at the time of the contract, or allege and prove his agency at the trial..... *Nott & Co. vs. Papet et al.*, 306

PRIVILEGE.—SEE MORTGAGE AND PRIVILEGE.

PROOF.—SEE EVIDENCE.

RAIL-ROADS.

1. The Pontchartrain Rail-Road Company have the exclusive right and privilege, for twenty-five years from 1830, of *constructing and using a rail-road* from the city of New-Orleans to lake Pontchartrain.

Pontchartrain Rail-Road Company vs. Orleans Navigation Company, 404

2. The legislature possesses the power of granting exclusive rights and privileges as the reward of constructing rail-roads, in the same manner as congress may reward the discoverer of a new invention..... *ib.*

RECONVENTION.

1. A plea in reconvention, claiming damages for alleged injury done to the credit, &c. of the defendant, by suing him on his own notes, will be *disallowed*, as there is no connection between the two demands.

Union Bank vs. Macdonald, 25

2. A plea in compensation and reconvention setting up different matters, in no way connected with the plaintiff's demand, will be *rejected*.

Merchants' Bank vs. Gove, 378

REDHIBITION.

PAGE

1. Where a slave died from a disease which was not incurable by its nature, nor had become so by the progress it had made at the time of the sale, and it is shown there was not that care and attention paid to the slave which the nature of his case required, no recovery of the price can be had in a redhibitory action or exception.

Serapurn, Syndic, &c. vs. Bousquet et al., 509

2. Where purchasers of a slave who died soon after the sale, are shown not to have acted as prudent men, and the loss of the slave may be attributed to their fault and neglect, they cannot avail themselves of redhibition to recover the price..... *ib.*

SALARY.

1. Where an engineer was employed by a cotton press by the year, at a fixed salary, and was discharged by the Company before the end of the year, without any other cause than that his services were *no longer required*, it was held that he is entitled to recover his salary for the whole term.....*Sherburne vs. Orleans Cotton Press*, 360

SALE.

1. Under the Roman law, no resolatory condition was implied in the contract of sale. If the *pactum commissarium* was not expressly stipulated, the vendor had no right to take back his property if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void.....*Canal Bank et al. vs. Copeland*, 75

2. If after the expiration of the stipulated time, the vendor sued for the price, he was considered as acknowledging the sale, and precluded from treating it as a nullity, or recovering back the property..... *ib.*

3. Under the law of Louisiana, the effect of the resolatory clause, implied in all synallagmatic contracts, is not to render the contract void *ipso facto*, but only *voidable* on the demand of the party complaining. There is, therefore, no inconsistency in suing for the rescission of the sale, after having claimed the price without success..... *ib.*

4. So, where the vendors sued the vendee for a specific compliance, with the terms of adjudication and payment of the price, and failed to enforce payment: *Held*, that an action for the rescission of the sale afterwards, was well brought..... *ib.*

5. The sale of a lot of ground in New-Orleans *before* the division of the city into municipalities, cannot be enforced or rescinded by the municipality in which the property is situated. This right can only be exercised by the mayor and commissioners of the sinking fund.

Municipality No. One vs. Brothers, 128



6. The registry act of congress passed in 1792, section 11, relating to ships and vessels, is only intended to regulate the national character of the vessel, and not to vest title in the new owner, by transfer and sale.

Begley vs. Morgan et al., 162

7. The transmission of a bill of sale to the purchaser, followed by its actual receipt, is a delivery to him at the moment of the transmission, which takes effect from its date..... *ib.*

8. In order to constitute a sale *per aversionem*, there must be certain limits or boundaries given, or a distinct and separate object described, as a field enclosed, or an island..... *Fisk vs. Fleming's Syndic*, 202

9. Where a tract of land is sold, with no boundaries or limits, except as fronting on the river, and described as having eight arpents front, forming about nine hundred and eighty superficial arpents, with an incomplete double concession, and it is afterwards ascertained to contain less, the purchaser must have the difference in price, in proportion to the diminution in quantity, refunded..... *ib.*

10. The purchaser at auction sales, looks for a description of the thing sold principally to the *procès verbal* of the auctioneer, or act of sale, rather than to title deeds delivered, furnishing evidence of title..... *ib.*

11. The admission of an agent, accepting a sale, that the title deeds to the property were furnished, does not amount to an exemption from warranty on the part of the vendor, as to the quantity of land set forth in the act of sale. *ib.*

12. The vendor cannot be aware that the property he sells was purchased on speculation, and with a view to immediate resale; and the vendee will not be allowed to set up as error in the motive, the fact that a tacit mortgage existed on the property, which was fraudulently concealed from him, in avoidance or rescission of the sale..... *Peirce vs. M-Mahon et al.*, 218

13. Where the tutor observes all the forms required by the act of 1830, authorizing a special mortgage to be substituted in lieu of the general one resulting from the tutorship, it frees the other property from all incumbrance; and a purchaser cannot set it up in avoidance of the sale.... *ib.*

14. Where an act of sale contains the clause *de non alienando*, any sale or transfer made in violation of it, is *ipso jure* void as respects the first vendor..... *Lawrence vs. Burthe et al.*, 267

15. The first vendor who sells with the clause *de non alienando*, may have the property on which the mortgage rests seized and sold, as if no change had taken place, and without notifying or making the vendee of his mortgagor a party..... *ib.*

16. Where an act of sale of mortgaged property is not recorded in the office of the Register of Conveyances, the original vendor has the right to act and proceed against the mortgaged property in the hands of the third possessor, as if it was still the property of the mortgagor.

Valetti vs. Alpuente, 269

17. Where a person buys an interest or share in a speculation of lands and town lots, which soon after suddenly decrease and fall greatly in value, from causes independent of any act or fault of the seller, he cannot resist payment of his notes or obligations, on the ground of failure of consideration.....*Slidell vs. McCoy's Executors*, 340

18. A hope or expectation of gain or profit in some enterprise or speculation, may form the object of a contract of sale..... *ib.*

19. On the dissolution of a sale the vendor is entitled, not only to take back the property, but to recover the fruits of the thing sold, during all the time the purchaser had it in possession, as the *rent* of a house and lot.

Derepas vs. Shalhus, 371

20. The owner cannot interpose another person to bid in his property for him at a resale, so as to charge the *folle enchère*, or first purchaser, failing to comply with the terms of sale. He becomes himself the purchaser, and there is, in fact, no sale.....*Banks vs. Hyde*, 391

21. A vendor on his vendee's failing to comply, must take his choice, either to regain his property, or insist on the payment of the price, by instituting suit..... *ib.*

22. Where a third person purchases in property at sheriff's sale, under an agreement to reconvey it when funds are placed in his hands to reimburse the price, and release him from his liability, the original owner, or his representatives, cannot claim any right to the property, when the reimbursement has not been made or tendered.

Gravier's Curator vs. Lartet et al., 400

23. The signature of a party to an act of sale, is proof that he accepted it.....*Barker to use of Atchafalaya Bank vs. Banks et al.*, 453

24. When there is no written evidence of the auctioneer's authority to sell, or the owner's assent, and the *procès verbal* is made out three or four years afterwards, by the clerk of the auctioneer acting as his attorney in fact, it is sufficient to compel a compliance on the owner of the property.

Short vs. Knight, 483

25. A tender of the notes or money to a notary not designated to draw up the act of sale, is insufficient to compel the owner to make a title in compliance with an adjudication..... *ib.*

26. An act of sale passed before the commandant of Pointe Coupée, in 1774, in presence of two witnesses, wherein it is stated that the vendor did not sign, because he could not write, but it is mentioned that the title was delivered to the vendee, who took immediate possession of the land; such an act possesses the requisites of an authentic act under the Spanish law.

Devall vs. Choppin et al., 566

27. Parole sales of immoveables have been repeatedly recognized under the Spanish law; and at that remote period, the ordinary mark of a party to an authentic act of sale, was not required..... *ib.*

28. The acts and authority of a commandant, putting a settler in possession of a part of the public domain, by a written permission or grant, showing the extent of the land conceded, and accompanied by proof of occupancy, will be considered *prima facie* a good and sufficient title. The acts of an officer to whom a public duty has been assigned, are *prima facie* taken to be within his power and authority..*Devall vs. Choppin et al.*, 566

SHERIFF.

1. The sheriff is without authority to seize and sell immoveable property or slaves, under execution issuing by a justice of the peace, when the sum is less than fifty dollars.....*Freeman, f. m. c. vs. Watts, Sheriff, &c.* 476
2. The fact of the defendant in the execution pointing out immoveable property, will not authorize the sheriff to sell, though it may to distrain, and hire or farm it out..... *ib.*

SLAVES.

1. Where certain slaves in the hands of third persons, claim to be set free under the provisions of the will of their former master; his executor must be made a party. They have a right to stand in judgment for the purpose of compelling the executor to emancipate them in pursuance of the provisions of the will, but this must be done contradictorily with him.

Bob & Milly et al. vs. Nugent's syndic, 63

STOPPAGE IN TRANSITU.

1. The vendor has the right to stop the goods *in transitu* and before they reach their destination, or are delivered to his vendee, on the latter becoming insolvent. This right is paramount to any lien of a third party against the purchaser.....*Hepp vs. Glover et al.*, 461
2. So, where goods on their passage are delivered to a consignee to be forwarded to the vendee, the vendor may claim the right of stoppage *in transitu*, while they are still in the hands of the agent or consignee..... *ib.*
3. If goods are delivered into the possession of an agent or consignee, for the purpose of conveyance to the vendee, it is not such a constructive delivery, as will deprive the vendor or creditor, of his right of stoppage *in transitu*..... *ib.*

SURETY.

1. The failure of one surety to demand a division *at the trial* does not authorize judgment *in solido* against him, but leaves him liable for the whole debt, in case of the insolvency of his co-sureties.

Atchafalaya Bank vs. Banks et al., 47

2. In case a surety demands the benefit of division at the trial, judgment must be for his *virile* share absolutely ; it cannot be for a larger sum ; but not having done so, he must remain *liable* in case of the future insolvency of his co-sureties.....*Atchafalaya Bank vs. Banks et al.*, 47

3 Where it appears that the *principal* is released from the obligation to account for certain moneys advanced to him, his sureties in the obligation will be discharged.....*Municipality No. Two vs. Groning et al.*, 166

SYNDIC.

1. When a syndic has been legally appointed, no individual creditor can sue him for a debt, or interfere with his administration. A creditor may call him to account, and produce his bank book, &c. but he cannot be harassed by suits, and with alleged fears of mismanagement, &c.

Lillard vs. Tarbe, Syndic, 421

2. For malfeasance or gross negligence, a syndic may be removed from office in due course of law, and made liable for damages in his individual capacity..... *ib.*

3. The syndicship is a personal trust which cannot be delegated to another. The syndic may empower an agent to do a particular act, especially in a place distant from his domicile.....*Hughes vs. His Creditors*, 446

4. The court is not authorized to remove a syndic from office for mere absence from the state, no matter how short. It is not a momentary absence, but the neglect of the interests confided to him, that justify his removal..... *ib.*

5. The creditors should be the judges whether their interests require another syndic should be appointed ; who, although under the supervision of the court, is properly the mandatory of the creditors..... *ib.*

TENDER.

1. An offer to deliver a box of goods after suit is commenced, without tendering the costs, does not possess the requisites of a legal tender.

McMaster & Hyde vs. Brander et al., 206

2. The plea of the general issue and averment that the goods described in the petition, were tendered and delivered, does not admit their value, as alleged by the plaintiff, and dispense with proof of it..... *ib.*

TUTOR.

1. Where the testator appointed his executor, also, tutor of his minor child, and directed that he keep the share of his child until he become of age, and the executor renounced the tutorship : *Held*, that he is bound to pay over the funds of the minor to the tutor afterwards appointed.

Percy, Tutor &c. vs. Provan's Executor et al., 69

2. The new tutor is bound to invest the funds as provided in the will, as the power of administering the estate of a minor, is exclusively given by law to the tutor..... *Percy, Tutor, &c. vs. Provan's Exécutor et al.*, 69
3. So, the attorney of absent heirs cannot interfere with the person or estate of a minor heir, while he is under the care and control of a tutor. *ib.*

USURY.

1. There is no usury in the sale of a note, although more than the highest rate of conventional interest was deducted, if the vendor does not endorse it, or is not a party to it. *Nott et al. vs. Papet et al.*, 306
2. It is of the essence of the contract of loan that he who receives money is bound to return it, and to which alone usury attaches..... *ib.*

VENDOR AND VENDEE.

1. The vendor of a lot of ground, situated in the limits of the Draining Company, is not responsible in any way to the purchaser, for the mortgage and claim which the company may have on the property sold for draining and enhancing the value : nor can the latter withhold the price or compel security to be given, as in case of a disturbance.
Municipality No. One vs. Leroy, 147
2. In the executory proceedings on an act of sale containing the pact *de non alienando* against mortgaged property, in the hands of the last vendee, in which no notice is required, the latter is not bound to call his vendor in warranty..... *Carter vs. Caldwell*, 471
3. The intermediate vendors sell with a knowledge of the first vendor's rights to go against the property, and the consequent danger of eviction of their vendees, against which they have guaranteed..... *ib.*
4. The intermediate vendor's obligation is to do, without notice, that which he would be bound to do if called in warranty, which is to pay the debt to the original vendor, or see it paid..... *ib.*
5. So, the last vendee when evicted, has a right to recover from his vendor the amount he has paid, who has the same rights against his vendor, *ib.*

VOYAGE.

1. A creditor for supplies furnished a ship or vessel, has a lien or privilege on the vessel for those furnished before her departure, if she has already made a voyage ; but this voyage must be considered as made to another port, and a return to the port of departure, before it is completed ; otherwise the privilege could never be claimed or enforced..... *Blake vs. Bredall*, 545
2. Claims against a vessel, ship or steam-boat, on the last voyage, for wages, supplies or materials furnished, &c., for which the Code gives a

privilege, will be allowed when the services, supplies, &c., have been rendered and furnished within and during the last sixty days before suit.

Shirley vs. Fabrique, 140

3. Sixty days will be taken as the duration of the last voyage, within which all privileged claims against vessels or steam-boats depending on this voyage, must be presented and enforced..... *ib.*

WAGES, AND WORK BY THE JOB.

1. Whether a contract be proved or not, a party will be allowed a reasonable compensation for his work done for the defendant, who was not benefited by it, without making compensation..... *Peterson vs. Short*, 159

2. Where it is shown that workmen refused to work by the job, the jury may allow their account for materials and work done, or so much as they think right, from all the circumstances and testimony adduced.

Varion et al. vs. Dupeyre, 260

3. When there is no formal delivery of work, if it is shown that the owner called for a detailed statement of what had been done, and said his negroes would finish the balance, it will be sufficient to charge him, and release the workman from a formal delivery..... *ib.*

4. Where an engineer of a cotton press was employed by the year at a fixed salary, and was discharged before the end of the year, without any other cause than that his services were no longer required by the company; it was held, that he is entitled to recover his salary for the whole term.

Sherburne vs. Orleans Cotton Press, 360

5. The engineer was entitled to receive his full salary as soon as he was discharged; and no condition could be afterwards imposed by his employer to return and perform his service for the remainder of the year..... *ib.*

WILL.

1. Where a nuncupative will, by public act, states, only, that the "testator declared, in the presence of witnesses, that the instrument contained his last will and testament, being dictated to the notary in the presence of the witnesses," is insufficient and null for informality, there being no mention of its having been dictated by the testator to, and written by the notary, as dictated..... *Verdun's Heirs vs. Verdun's Executor and Legatees*, 28.

2. There must be five witnesses to a nuncupative will, under private signature, unless it is made in the country, and a greater number than three witnesses cannot be obtained, which must be made to appear..... *ib.*

3. A clause in a will or testament, which extends the powers of executors in their mere capacity as such, to enable them to keep the funds of the succession in their hands after they have become *functi officio*, ought to be considered as not written..... *Percy, tutor vs. Provan's Executor et al.*, 69



4. Provisions in a will appointing a tutor to the sole minor child, and also directing him to be sent out of the country, to his grand-parents, until he comes of age, cannot both be executed. If the minor be put under a tutor, he must remain here until majority..... *ib.*

5. Where it is shown that a testator was subject, from intemperance, to spells of insanity, which become general by long indulgence, but the witnesses to the will testify that he was sober and rational at the time of signing, he will be deemed competent to make a valid will.

Hart vs. Thompson's Executor and Legatees, 88

6. Sealing and closing a mystic will with wafers, and making the witnesses sign across and between the wafers on the envelope, is a sufficient sealing and enclosing within the meaning of the law, without the use or impress of a seal..... *ib.*

WITNESS.

1. A witness who swears to the best of his recollection, does not swear positively, and his testimony is insufficient to establish a positive fact, for want of certainty..... *Babcock et al. vs. Eldridge. 149*

2. Where the witnesses are of equal credibility, and differ in their testimony, the one having the best opportunity to know the facts testified to, will be entitled to the most weight..... *Forsyth vs. Despierris's Executors, 215*

3. The testimony of several witnesses, who swear positively to a transaction and discharge of the defendant from the debt sought to be enforced, will outweigh the testimony of a single witness to the contrary who was not present all the time of the transaction..... *Delafield et al. vs. Sherwood, 271*

